88-326

No.

Supreme Court, U.S.
FILED
AUG 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HOWARD SMITHSON and MARETTA SMITHSON,
Petitioners,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Steve Alexander, Esq.
Counsel of Record

John F. Arens, Esq.
Richard P. Alexander, Esq.
ARENS & ALEXANDER
31 East Center Street
Post Office Box 1152
Fayetteville, AR 72702
501/442-0584

Counsel for Petitioners

Of Counsel:

Nancy S. Kettelle, Esq.
1700 N. Moore Street
Arlington, VA 22209
703/558-8818

August 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

A. Whether a claim alleging undue delay by the Farmers Home Administration ("FmHA") in performing a contractual promise to make or insure future loans to a current farmer borrower is vindicable in contract.

B. Whether applicable FmHA regulations become material terms of a farmer borrower's loan contract and security agreement with the FmHA.

C. Whether the Federal Circuit, when it affirmed the Claims Court's grant of summary judgment against petitioners, violated summary judgment standards reaffirmed by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those named in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners, Howard and Maretta Smithson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above-entitled proceeding on May 11, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 847 F.2d 719 (Fed. Cir. 1988), and is reprinted in the appendix hereto (App. A, *infra*, 2a).

The opinion of the United States Claims Court is reported as *Nutt v. United States*, 12 Cl. Ct. 345 (1987). It is reprinted in the appendix hereto (App. A, *infra*, 11a).

JURISDICTION

Invoking jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), petitioners brought this suit in

the United States Claims Court. On May 15, 1987, the Claims Court granted respondent's renewed motion for summary judgment and dismissed petitioners' complaint. On petitioners' appeal, the Federal Circuit on May 11, 1988, entered a judgment (reprinted in the appendix hereto (App. A, *infra*, 1a)) and opinion affirming the judgment of the Claims Court. On July 29, 1988, Chief Justice Rehnquist extended the time in which to file a petition for a writ of certiorari until August 23, 1988 (order reprinted in the appendix hereto (App. A, *infra*, 78a)).

The jurisdiction of this Court to review the judgment of the Federal Circuit is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves 28 U.S.C. § 1491 (a)(1) (reprinted at App. A, *infra*, 45a) and 28 U.S.C. § 1346(a)(2) (reprinted at App. A, *infra*, 44a).

Other statutes and regulations involved are reprinted in pertinent part in Appendix A. They include 7 U.S.C. § 1981a (App. A, *infra*, 42a), 7 C.F.R. § 1951.33 (App. A, *infra*, 62a) and 7 C.F.R. § 1962.17 (App. A, *infra*, 71a). Additional statutes and regulations that describe the loan program in issue have been included in Appendix A for the convenience of the Court.

STATEMENT OF THE CASE

I. Facts

The Farmers Home Administration ("FmHA") is the agency authorized by the Secretary of Agriculture to extend financial assistance to eligible farmers. 7 U.S.C. § 1981. FmHA may provide this assistance

not only by making or insuring loans (7 U.S.C. § 1921) but also by deferring principal and interest on outstanding FmHA loans (7 U.S.C. § 1981a) as well as by consolidating, rescheduling, or reamortizing certain loans. (7 U.S.C. § 1946; 7 C.F.R. §§ 1945.168, 1951.33). The FmHA has also provided for the release, under specified circumstances, of chattel security pledged by the farmer as loan collateral. 7 C.F.R. § 1962.17.

Petitioners, husband and wife, are family farmers in Castro County, Texas, who received FmHA loans (both farm ownership and emergency loans) between 1972 and 1983. App. A, *infra*, 5a. To ensure payment of these loans, the petitioners and the FmHA executed several promissory notes and security agreements. *Id.*

The promissory notes included the following provision:

> This Note shall be *subject to the present regulations* of the Farmers Home Administration *and to* its *future regulations not inconsistent* with the express provisions hereof.

C.A. App. 98-100 at 99[1] (emphasis supplied).

The security agreements included the following provisions:

> IV. IT IS FURTHER AGREED THAT:
>
> E. This Agreement is *subject to the present regulations* of the Secured Party *and to* its *future regulations not inconsistent* with the express provisions hereof.

[1] "C.A. App." denotes the Appendix filed in the court of appeals.

. . .

> J. Secured Party will make or insure future loans or advances to Debtor *to enable him to raise or harvest farm crops* or raise livestock or other animals, provided funds are available and the Debtor meets all then current requirements imposed by regulations of the Secured Party.

C.A. App. 72-76 at 76 (emphasis supplied).

Before 1984, petitioners raised and harvested spring crops on 210 acres of their own land together with approximately 2,000 acres of leased land. *Id.* at 46. The lease required that rent be paid to the landlord in the form of a percentage share of the crops produced on the land. *Id.* Petitioners had to raise crops on the land, from which rent could be paid, or surrender the leasehold. *Id.* The FmHA loan program was the only available source for the funds petitioners needed to prepare the land and plant their crops. *Id.*

On January 10, 1984, petitioners submitted a completed FmHA application form requesting financial assistance to continue farming in the coming crop year. App. A, *infra*, 5a; C.A. App. 48, 101-102. Petitioners then worked with the FmHA County Supervisor to prepare a Farm and Home Plan ("FHP") (App. A, *infra*, 5a; C.A. App. 48), a current FHP being a prerequisite to FmHA assistance (7 C.F.R. § 1924.57(e)).

Petitioners, by Mr. Smithson's affidavit, have presented evidence that the County Supervisor devised a false FHP dated January 30, 1984, which he submitted to the FmHA State Office, that petitioners had not agreed to this plan, and that the numbers on this plan were not correct and were not the num-

bers petitioners had supplied to the County Supervisor. C.A. App. 48-49. In deposition testimony, FmHA officials admitted that the January 30th FHP submitted to the State Office was erroneous, improperly worked up, and internally inconsistent.[2] *Id.* at 256-259; 304-307. The State Office did not approve the January 30th FHP, and on February 15, 1984, responded to the County Supervisor's submissions by severely criticizing petitioners' financial condition. *Id.* at 112-113.

On February 21, 1984, petitioners' accountant reviewed petitioners' County Office file and saw the incorrect January 30, 1984, FHP and the State Office response. C.A. App. 140-141. Two days later, on February 23, 1984, the County Supervisor began work on a correct FHP. *Id.* at 141. When it was complete, petitioners signed this new, correct FHP, and the County Supervisor forwarded it to the State Office on March 8, 1984, along with a signed, but otherwise blank (*id.* at 155), County Committee certification form of borrower eligibility dated March 1, 1984 (App. A, *infra* 5a).

In a notice dated April 6, 1984, the State Office notified the County Supervisor that it had approved a $265,000 loan for petitioners, based on the correct numbers in the new FHP. *Id.*

But by April 1, 1984, petitioners had already surrendered the 1,977 acres of leased land (*id.*), because it

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[2] An example of this inconsistency was noted by the State Office itself. In its comments on the January 30th FHP the State Ofice said: "We do not know where the county supervisor got the figures for crop income in Table J of $278,000.00 when the Farm and Home Plan shows $365,000.00." C.A. App. at 113.

was by then too late to prepare that land and plant crops that would produce a harvest. C.A. App. 46, 50. In deposition testimony an FmHA official testified that FmHA knew that petitioners paid rent on their leased land in the form of a percentage share of the crops grown on the land, that petitioners could not farm the land unless they got the FmHA assistance for which they had applied, that there is a time when it is too late to plant a crop, and that if petitioners could not plant their crops, they would have to turn back the leased land to the landowner. *Id.* at 332-337.

Because petitioners had already surrendered the leased land, and because it was by then too late to use the aproved $265,000 loan for the approved purposes, petitioners declined the FmHA loan, and, on May 11, 1984, they submitted a revised FHP proposing crop operations on their remaining 210 acres. Their revised FHP required FmHA financial assistance in the form of deferral of loan payments, consolidation, and rescheduling of loans (App. A, *infra*, 5a), along with release of chattel security (C.A. App. 50-51; 131-134).

On May 25, 1984, the FmHA State Office refused to give substantive consideration to petitioners' revised application for FmHA services stating: "FmHA has no authority to make any arrangements with Mr. Smithson regarding the financing of his 1984 crops at this time." C.A. App. 136. Petitioners attempted to appeal that determination, but were told that it could not be appealed. App. A, *infra*, 5a.

II. History Of The Case

Petitioners filed the instant suit in the United States Claims Court alleging causes of action based on the

Tucker Act, 28 U.S.C. § 1491(a). Petitioners sued, claiming breaches of material terms of their loan contracts (the security agreements and promissory notes). They claimed that respondent failed to timely approve petitioners' 1984 crop loan (*i.e.*, unduly delayed in processing and approving the loan). They also claimed that respondent refused even to give substantive consideration to their revised FHP requesting FmHA services, in beach of petitioners' contract. C.A. App. 38-42.

Petitioners argued that (a) material FmHA regulations were incorporated into their agreements with that agency, (b) FmHA violated several of those regulations, thus breaching the agreement, and (c) FmHA unduly delayed processing and approving their 1984 crop loan causing them to suffer loss. Furthermore, petitioners argued that the delay frustrated the very purpose of FmHA's contractual promise to lend, which was to enable petitioners to plant crops.

In opposition to respondent's renewed motion for summary judgment, petitioners, by Mr. Smithson's affidavit and by deposition testimony of FmHA officials, presented evidence that it was arbitrary and capricious conduct by the FmHA County Supervisor which caused the delay.

The Claims Court dismissed the complaint. The judge stated that, from FmHA's inclusion in its security agreement of the provision "[t]his agreement is subject to the present regulations of the [FmHA] . . .," it would be unreasonable to infer that FmHA meant thereby to obligate itself to comply with its own regulations or risk damages for breach of contract. App. A, *infra*, 26a. The court of appeals also rejected petitioners' contention that the agency's applicable regulations formed an integral part of their

contract with FmHA and that violation of any of those regulations can serve as a proper basis for petitioners' claims of breach of contract. *Id.* at 8a.

With respect to petitioners' claim that FmHA unduly delayed in processing and approving their loan application causing them to suffer economic losses, the Claims Court held that "absent both an *en masse* incorporation of regulations and express or implied contractual promises by the FmHA to evaluate loan applications according to some time schedule, the Smithsons' [petitioners'] breach claim based on timeliness must fail." *Id.* at 26a-27a. In thereafter granting summary judgment against petitioners, the Claims Court necessarily held (albeit implicitly) that petitioners' contract had neither an express nor an implied timeliness therm.

Rather the Claims Court concluded that "when, as in the instant case, a plaintiff alleges that the FmHA delays a loan approval . . . claims should be brought as tort actions instead of breach of contract claims." *Id.* at 27a. The Claims Court made no findings as to whether the delay between petitioners' submission of their completed application and the state office's approval of their loan included delay caused by FmHA conduct that a trier of fact could reasonably find to have been arbitrary, capricious, in bad faith, or an abuse of discretion.

The court of appeals affirmed the judgment of the Claims Court, stating that the clause in the security agreement did not set any time limits or schedules for making future loans or advances and that any undue delay by FmHA in making the loan is vindicable, if at all, only in a tort action of which the Claims Court would have no jurisdiction. *Id.* at 9a. The court of appeals noted that:

> though the appellants repeat that FmHA engaged in arbitrary, capricious, culpable and bad faith conduct toward appellants, the Claims Court made no such findings and did not even determine that the Smithsons had raised a genuine issue as to those characterizations . . .; we must therefore assume that . . . there is no evidence before us of such active misconduct. We cannot assume its existence, as appellants do.

Id. at 6a. The court of appeals added that, "on the record before us, the 83 days the agency took to approve the 1984 loan does not seem unduly delayed or an abuse of discretion under the loan and security agreements." *Id.* at 9a.

REASONS WHY PETITION SHOULD BE GRANTED

I. The Federal Circuit's holding that a claim alleging undue delay in performing a contractual promise is not vindicable in contract directly conflicts with holdings by Courts of Appeals in the Third Circuit and the Fifth Circuit. The Federal Circuit's holding also ignores legal principles set forth by this Court.

Under the Tucker Act, 28 U.S.C. § 1491(a)(1), the United States Claims Court has "jurisdiction to render judgment upon any claim against the United States founded upon . . . any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." The court of appeals acknowledged that petitioners had contracts with FmHA and that the Claims Court had initial jurisdiction over the case under 28 U.S.C. § 1491. App. A, *infra*, 6a.

The express purpose of the contractual promise to lend was *to enable* petitioners to raise or harvest farm

crops, and there was thus an implied contractual duty to make the loan *before it was too late* for petitioners to plant their crops. Furthermore, *undue* FmHA delay in processing and approving their loan application breached FmHA's implied contractual duty to carry out its bargain reasonably and in good faith. Both the Claims Court and the court of appeals held that any undue FmHA delay is vindicable, if at all, only in a tort action of which the Claims Court would have no jurisdiction. *Id.* at 27a, 9a.

Decisions by the Third and the Fifth Circuit Courts of Appeals uphold petitioners' arguments. The instant decision of the Federal Circuit conflicts with the holding of the Third Circuit in *Petersburg Borough v. United States*, 839 F.2d 161 (3d Cir. 1988), and with the holding of the Fifth Circuit in *United States v. Huff*, 165 F.2d 720 (5th Cir. 1948). Furthermore, the decision of the Federal Circuit in the instant case cannot be reconciled with the legal principles set forth by this Court in *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980), and in *Keifer & Keifer v. Reconstruction Finance Corp. and Regional Agricultural Credit Corp.*, 306 U.S. 381 (1939).

In *Petersburg Borough v. United States*, 839 F.2d 161 (3d Cir. 1988), the FmHA had agreed to finance a sewage treatment plant to be constructed by the Borough with a grant and low interest loan. The FmHA admitted, for the purpose of the appeal, that FmHA had misplaced the file including the Borough's application thus causing a delay in closing the grant and loan. As a result, the Borough had suffered economic losses and had brought suit in the district court under the Federal Tort Claims Act. The district court held that the action was barred by the discretionary

function exception to liability under the Tort Claims Act.

On appeal, the Third Circuit said:

> It seems clear to us that this case does not involve a tort but rather is an action for a breach of contract as the alleged wrongful conduct of which the Borough really complains is the Administration's delay in closing the financing package. . . . Therefore this case involves a contract claim against the United States in excess of $10,000 and is within the exclusive jurisdiction of the Claims Court under the Tucker Act 28 U.S.C. § 1346(a)(2); 28 U.S.C. § 1491.

839 F.2d at 162.

The facts in *Petersburg Borough* are nearly identical to those of the instant case. In both cases, FmHA borrowers alleged not that the FmHA failed to make a promised loan, but that the FmHA unduly delayed in making a promised loan and thereby caused economic loss. In *Petersburg Borough*, the undue delay was caused by FmHA personnel misplacing a file that included the borrower's loan application; the Third Circuit held that the borrower had a contract claim under the Tucker Act. The Third Circuit opinion neither stated nor implied that the borrower needed to show that FmHA conduct causing the delay was arbitrary, capricious, or in bad faith. In petitioners' case the undue delay was caused by the FmHA arbitrarily using inaccurate data in devising a FHP for petitioners such that before the loan could be approved it was necessary to revise and rework the

FHP using accurate data.[3] The Federal Circuit's holding that petitioners do not have a contract claim under the Tucker Act conflicts with the Third Circuit's holding in *Petersburg Borough*.

In *United States v. Huff*, 165 F.2d 720 (5th Cir. 1948), the United States leased land from private parties for an army camp and artillery firing range. The lease permitted owners and tenants to continue to use lands for sheep and livestock grazing and provided that:

> The Government shall have the right, during the existence of this lease, to let down any wire on the now existing wire fences, with the understanding that following the crossing of said fences by troops, the Government will restaple said wire to the posts, and leave the fence in as good repair as it was at the time of entry upon the leased premises by the Government.

165 F.2d at 723. The tenants' complaints alleged that the Government's failure to repair fences promptly constituted negligence which caused loss of and damage to their sheep and goats on the land leased to the government. The complaints were brought under 28 U.S.C. § 41(20), the then-current version of the

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[3] The absence of an explicit time schedule in petitioners' contract documents does not insulate respondent from liability for FmHA's undue delay in fulfiling its contractual promise to lend because it is basic contract law that a contracting party may still be liable for damages caused by delay even though there is no unqualified warranty or express covenant to perform at or by a definite time. *Burgess Const. Co. v. M. Morrin & Son*, 526 F.2d 108, 113 (10th Cir. 1975); *Commerce International Co. v. United States*, 338 F.2d 81, 85 (Ct. Cl. 1964); *Cedar Lumber, Inc. v. United States*, 5 Cl. Ct. 539, 549 (1984).

Tucker Act, which in pertinent part is identical to 28 U.S.C. § 1491(a)(1).

The Fifth Circuit held that there was jurisdiction of the case under the Tucker Act. It concluded that failure to repair fences within a reasonable time following passage of troops was "negligence, a tortious breach of contract." 165 F.2d at 725. In answer to the Government's contention that the tenants could not recover under the Tucker Act which excludes jurisdiction of cases sounding in tort, the Fifth Circuit said that a "tortious breach of contract is not a tort independent of contract so as to preclude an action under the Tucker Act."[4] 165 F.2d at 720.

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[4] In the instant case both the Federal Circuit and the Claims Court ignored the Federal Circuit's own acknowledgement of this principle in *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed. Cir. 1984) *cert. denied*, 474 U.S. 818 (1985), where the Federal Circuit said that under the Tucker Act "an action may be maintained . . . which arises primarily from a contractual undertaking regardless of the fact that the loss resulted from the negligent manner in which defendant performed its contract." *Id.* at 1576 (citations omitted). The Claims Court and the Federal Circuit also ignored the long line of cases in the Court of Claims and Claims Court which have held that where an enforceable contract is alleged, an action for breach is not outside the bounds of the Tucker Act simply because elements of tort are present in the claim. The Court of Claims and Claims Court have used this long-standing reasoning time and again to support the proposition that a tortious breach of contract is not a fact independent of the contract so as to preclude an action under the Tucker Act. *E.g.*, *Chain Belt Co. v. United States*, 115 F. Supp. 701, 711-12 (Ct. Cl. 1953); *Burtt v. United States*, 176 Ct. Cl. 310, 314 (1966); *Bird & Sons, Inc. v. United States*, 420 F.2d 1051, 1054 (Ct. Cl. 1970); *Fountain v. United States*, 427 F.2d 759, 761 (Ct. Cl. 1970), *cert. denied*, 404 U.S. 839 (1971); *Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741, 745 (1980); *L'Enfant Plaza Properties, Inc. v. United States*, 645

The contract provision interpreted by the Fifth Circuit in *Huff* set no time limit or schedule for repairing the fences. The Fifth Circuit looked to the underlying purpose of the contract provision requiring that fences be repaired following the passage of troops. It found that underlying purpose to be protection of the livestock. The Fifth Circuit concluded that in order to effectuate the underlying purpose, the Government was required to repair the fences within a reasonable time and that time would be determined by the circumstances existent in sheep country.[5]

In petitioners' case, the Federal Circuit ignored the *stated* purpose of the contract provision in which the FmHA promised to make future loans—that purpose being *to enable* the farmer to raise or harvest farm crops. In order that the loan "enable" the farmer to raise or harvest farm crops, the FmHA must necessarily approve the loan and disburse the funds within a reasonable time. The surrounding circumstances that determine a reasonable time in petitioners' case are the circumstances extant with

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F.2d 886, 892 (Ct. Cl. 1981); *South Louisiana Grain Services, Inc. v. United States*, 1 Cl. Ct. 281, 288 (1982); *H.H.O., Inc. v. United States*, 7 Cl. Ct. 703, 707 (1982); *Gregory Lumber Co. v. United States*, 9 Cl. Ct. 503, 525-26 (1986); *DeRoo v. United States*, 2 Cl. Ct. 356, 362 (1987).

[5] The Fifth Circuit in *Huff* did not require that the government conduct be arbitrary, capricious, or in bad faith in order to find a breach of the contract. In the instant case petitioners have presented evidence from which a trier of fact could reasonably find that FmHA conduct was arbitrary and capricious. But even if the trier of fact did not so find, petitioners monetheless have a contract claim under both *Huff* and *Petersburg Borough*. Thus even though the Federal Circuit in the instant case said it must assume no arbitrary or capricious FmHA conduct, it did not fully dispose of petitioners' contract claim.

respect to the planting season for spring crops in Castro County, Texas. By arbitrarily using inaccurate data in petitioners' FHP, the FmHA County Supervisor caused the loan approval to be delayed beyond this reasonable time. The loan was not approved until after petitioners were forced to surrender their leased land. Thus petitioners were *not able* to raise or harvest crops in 1984.

The cited cases from the Third and Fifth Circuits follow the legal principles set forth by this Court, while the decision of the Federal Circuit in the instant case ignores those principles. In *Hatzlachh Supply Co., Inc. v. United States*, 444 U.S. 460 (1980), this Court, in a per curiam opinion, held that the United States may be held liable in an action under the Tucker Act for breach of an implied-in-fact contract of bailment when goods are tortiously lost while held by the United States Customs Service following their seizure for customs violations. The Government stated that "the absence of Government tort liability [because of an exception from tort liability under the Federal Tort Claims Act] has not been thought to bar contractual remedies on implied-in-fact contracts, even in those cases also having elements of a tort" 444 U.S. at 465. Thus this Court acknowledged that a "tortious breach" of contract will not preclude an action under the Tucker Act.

In *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381, 395 (1939), this Court decided that Regional Agricultural Credit Corporation, a government-financed and managed corporation, was subject to suit and that recovery could be had in contract against Regional for damages resulting from its negligence in failing to provide proper care for livestock entrusted to it in a cattle-feeding contract. In reach-

ing that conclusion, the Court stated that the negligence in failing to properly feed and water the livestock was not a wrong disassociated from carrying out the cattle-feeding contract. 306 U.S. at 394. The Court found this to be "evident from the recognized liability of the United States itself as lessee and bailee even under the explicit restrictions of the Court of Claims Acts."[6] 306 U.S. at 394-95.

The *Keifer* opinion pointed out that both this Court and the Court of Claims

> have recognized that the breach of [the] implied duty of a lessee "not to commit waste, or suffer it to be committed," and of a bailee not to neglect "to exercise ordinary care and skill" are *duties that have their source in contract even though the guilty agents may be merely tort-feasors.*

306 U.S. at 395 (citations omitted; emphasis supplied).

In petitioners' case, the undue delay in loan approval, caused by the County Supervisor's use (whether arbitiary and deliberate or merely negligent) of inaccurate data, derives from a contractual undertaking, that is, from the performance of the FmHA contractual promise to make loans *to enable* petitioners to raise crops. Thus under *Keifer*, and contrary to the holding of the Federal Circuit, petitioners have a claim in contract.[7]

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[6] The Court of Claims Acts were predecessors to today's Tucker Act.

[7] In *Bigby v. United States*, 188 U.S. 400 (1903), this Court stated clearly that where the matter out of which a claim arises has elements of both contract and tort, the plaintiff may forbear to sue in tort and sue in contract. *Id.* at 409. In *Bigby* there

In addition to the conflict of the court of appeals decision with decisions in other circuits, its failure to follow legal principles set forth by this Court, and even the disparity of the decision with many Claims Court and predecessor Court of Claims decisions, the issue of tortious breach of contract is important not only to petitioners here but to literally thousands of other family farmers who, in turning to the FmHA as their lender of last resort, have executed the same security and loan agreements as those at issue here. To allow a decision to stand that would relieve the government of important, bargained for, contractual obligations would be an intolerable injustice.

II. The Federal Circuit's holding that controlling statutes and material regulations are not incorporated into FmHA's loan contracts with farmer borrowers conflicts with legal principles set forth by holdings of Courts of Appeals in the Second Circuit and the Sixth Circuit. It also ignores basic rules of contract interpretation.

When the United States contracts with a private party, and federal statutory and regulatory provisions define the purpose of the contract and govern the parties' performance, the material provisions are incorporated in the contract by operation of law. In any event, where the writings comprising the contract contain express references to controlling federal regulations, such as, "this Note shall be subject to the present regulations of the Farmers Home Administration and to its future regulations not inconsistent with the express provisions hereof" (C.A. App. 99),

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was no element of contract between the plaintiff and the Government, and this Court held that the claim sounded in tort. *Id.*

the contract incorporates the regulations by reference.

The Federal Circuit in the instant case held that the language in petitioners' contract did not serve to incorporate material FmHA regulations into the contract by reference. It did not address petitioners' argument that controlling statutes and regulations are incorporated into their contract by operation of law and thereby ignored legal principles followed by Courts of Appeals in the Second Circuit and the Sixth Circuit.

In *Bodek v. Dept. of Treasury, Bureau of Public Debt*, 532 F.2d 277 (2d Cir.), *cert. denied*, 429 U.S. 849 (1976), the Second Circuit considered whether duplicate savings bonds should be issued to a plaintiff who claimed that his mother, the named co-owner of the bonds, had stolen the originals from him. The Second Circuit concluded that because plaintiff had not proved his exclusive ownership of the bonds, he cout not compel the Treasury Department to issue him duplicate bonds. In reaching its determination the Second Circuit considered the contractual obligations of the government and the bondholder. The Second Circuit noted that jurisdiction had been conferred by the Tucker Act and stated that "Treasury regulations are considered an implied part of the contract between the United States and a purchaser of its bonds."[8] 532 F.2d 279 n.7.

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[8] *Accord Wolak v. United States*, 366 F.Supp. 1106, 1110 (D. Conn. 1973) (pertinent federal regulations are an implied part of the contract between the Government and a purchaser of savings bonds; the Government has a consequent contractual duty to comply with its regulations in redeeming savings bonds);

In *Neal v. Bergland*, 646 F.2d 1178 (6th Cir. 1981), *aff'd sub nom. Block v. Neal*, 460 U.S. 289 (1983), plaintiff, who was the recipient of a direct rural housing loan from FmHA, alleged a breach of contract by FmHA. The plaintiff had entered into a construction contract with a private builder for the construction of a prefabricated house using the loan proceeds to pay for the house. During the course of construction FmHA had conducted inspections of the house. After she had moved into the house, plaintiff had notified the builder and FmHA of several defects in the house. Neither the builder nor FmHA would pay for correcting the defects. Plaintiff sued the builder and FmHA. Plaintiff alleged a breach of contract by FmHA for failure to provide technical assistance including inspection and supervision of construction of the house, negligence for failure to properly execute its obligation to inspect and supervise construction of the house; and detrimental reliance for failure to perform its regulatory obligations as promised. The Sixth Circuit held:

> Plaintiff's contract claim turns on the nature and extent of FmHA's obligations, if any, to provide technical assistance and to inspect and supervise construction. To find FmHA had *a contractual obligation* it *must be expressly provided for either in the Act, the regulations, or the loan papers*, or it must be implied in fact . . . .

646 F.2d at 1181 (emphasis supplied). After examining and discussing the material statutory and reg-

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Spicer v. United States, 217 F.Supp. 44, 50 (D. Kan. 1963), *aff'd* 322 F.2d 750 (10th Cir. 1964) (savings bonds are issued pursuant to a contract between the purchasers and the United States; the Treasury Regulations constitute a part of that contract).

ulatory provisions, the Sixth Circuit held that none included "a clearly defined obligation on the part of FmHA running to plaintiff" to perform as plaintiff had alleged, and held that under the Federal Housing Act, the applicable regulations promulgated under it, and the loan papers, FmHA owed no "contractual obligation" such as plaintiff had sued upon.[9] *Id.*

If the instant case had been before the Sixth Circuit, in order to determine whether FmHA had those contractual obligations to the petitioners which petitioners claim it had, that court would have looked "in the Act, the regulations, or the loan papers." *Id.* In contradistinction, the Federal Circuit did not look at all to statutory or regulatory provisions to determine the FmHA's contractual obligations.[10] It did look

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[9] The Court of Claims itself found that where federal regulations govern material aspects of the parties performance under a contract between the United States and another party, the regulations constitute terms incorporated into the contract by operation of law. *Hills Transportation Company v. United States*, 492 F.2d 1394, 1396-97 (Ct.Cl. 1974) (held grovernment breached contract by violating a postal regulation that had not been incorporated into contract either physically or by reference; regulation had not even been in effect at time parties entered contract); *De Matteo Construction Company v. United States*, 600 F.2d 1384, 1391 (Ct.Cl. 1979) (held Postal Service regulations issued pursuant to statutory authority have force and effect of law, and, if they are applicable, must be deemed terms of the contract even if not specifically set out therein); *Jackson v. United States*, 573 F.2d 1189, 1194-97 (held that written enlistment documents signed by Army enlistee along with all statutes and Army Regulations in force constituted his enlistment contract).

[10] Here, FmHA was contractually obligated to abide by controlling statutes and regulations but violated them by refusing in May 1984 "to make any arrangements with" (C.A. App. 136) petitioners for loan consolidation and rescheduling (7 C.F.R. § 1951.33), deferral of loan payments (7 U.S.C. §

to the loan papers but held that the references in the petitioners' promissory note and security agreement were ineffective to incorporate material federal regulatory provisions into the contract as binding contractual obligations.

"It is well settled that existing laws are read into contracts in order to fix the rights and obligations of the parties." *Rehart v. Clark*, 448 F.2d 170, 173 (9th Cir. 1971) (citing *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947)). The Ninth Circuit in *Rehart* went on to state that "[t]his is also true of valid regulations having the force and effect of laws of general application." 448 F.2d at 173. Regulations of an executive department have the force and effect of law. *Jackson v. United States*, 573 F.2d 1189, 1194 (Ct. Cl. 1979) (citing *Paul v. United States*, 371 U.S. 245 (1963); *Maryland Casualty Co. v. United States*, 251 U.S. 342 (1920)). Logically, then, regulations in effect when a government contract is made become a part of the contract. *Jackson v. United States*, 573 F.2d at 1194.

Applying these legal precepts, one reasonably concludes that a clause such as:

> IT IS FURTHER AGREED THAT:
>
> E. This agreement is subject to the present regulations of the Secured Party [FmHA] and to its future regulations not inconsistent with the express provision hereof

(C.A. App. 76) serves to do more than to put the borrower on notice that FmHA regulations apply to

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1981a, 7 C.F.R. § 1951.33), and release of chattel security (7 C.F.R. § 1962.17).

him. In the security agreement, for example, not only the borrower, but the borrower *and* FmHA, agree that the agreement is subject to FmHA regulations. What this logically means to the borrower is that if he violates a material FmHA regulation, he breaches the Security Agreement, and conversely, if FmHA violates a material FmHA regulation, it breaches the security agreement.[11]

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[11] In *Dahl v. United States*, 695 F.2d 1373 (Fed. Cir. 1982), plaintiffs' FmHA promissory note and security agreement contained language identical to that found in petitioners' loan documents, *i.e.*, "This note shall be subject to the present regulations of the Farmers Home Administration . . ." and "This agreement is subject to the present regulations of the Secured Party . . ." (*id.* at 1376). The *Dahl* panel said, "The terms of the parties' agreement, including the controlling regulations, were incorporated into the promissory note and security agreement" (*id.*). The Federal Circuit panel in the instant case dimissed the importance of *Dahl* by saing "The *Dahl* opinion did refer generally to the contractual arrangement as including the controlling regulations' (*id.* at 1376), but that general observation had nothing to do with the result of that case and must be regardded as a slight and unnecessary dictim." App. A, *infra*, 8a n.3. Petitoners respectfully suggest that the Federal Circuit misread *Dahl*.

One of the issues in *Dahl* was whether FmHA breached its contract and abused its discretion when the State Director unilaterally closed plaintiffs' supervised bank account and terminated their loan. In order to decide this issue, the *Dahl* panel looked to the regulations. The panel said, "The regulations provide that a supervised bank account may be closed by unilateral action of the state director for the following reasons: death of the borrower, borrower in default, inactive borrower, or when the borrower is paid up. 7 C.F.R. 1803.10(d) [1977]. . . . We have pointed out above that plaintiffs were in default. This was enough to authorize the unilateral termination of the account and loan." *Id.* at 1380. The *Dahl* panel went on to say, "The termination and cancellation of the loan contract by the state director was accomplished in accordance with the statutes, the

In its opinion, the Federal Circuit concluded that the clause quoted above did not incorporate FmHA regulations into the contract because it

> must refer, not to specific regulations or particular matters, but to the entire corpus of FmHA regulations [some 1200 pages of the C.F.R.] without exception. . . . The farmer could then choose among a multitude of regulations as to which he could claim a contract breach. . . .

App. A. *infra*, 7a. Petitioners contend that a more reasonable interpretation of the clause is that the agreement is subject to material FmHA regulations that apply to the circumstances of the borrower with whom the FmHA has made the agreement. Further, in order to claim a contract breach the borrower must show that the incorporated regulation benefitted him and that FmHA's violation of the regulation caused him financial injury. Petitioners' construction of the provision is both reasonable and practical.

If a contract provision is susceptible to more than one reasonable interpretation, an ambiguity exists and the doctrine of *contra proferentem* requires that the ambiguous term be construed against the drafter of the contract and in favor of the other party. *Cherry Hill Sand & Gravel Co. v. United States*, 8 Cl. Ct.

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regulations, and the note and security agreement signed by the plaintiffs. Therefore, the director did not abuse his discretion nor [sic] breach the contract." *Id.* at 1381. Thus the *Dahl* panel arrived at its holding that the State Director did not breach the contact only after the panel determined that the State Director did not violate a regulation. One must conclude that in the view of the *Dahl* panel the regulations were incorporated into the agreement by reference, or if not by reference, by operation of law.

757, 767 (1985). In *United States v. Seckinger*, 397 U.S. 203 (1970), this Court concerned itself with the construction of a provision common to fixed-price government construction contracts. The *Seckinger* Court pointed out that among the general principles concerning the interpretation of contractual provisions is the "general maxim that a contract should be construed most strongly against the drafter. . . ." *Id.*, 397 U.S. at 210. The Court concluded:

> This principle is appropriately accorded considerable emphasis in this case because of the Government's vast economic resources and stronger bargaining position in contract negotiations.

Id., 397 U.S. at 216 (footnote omitted). The Federal Circuit accorded this principle no emphasis in the instant case.

The contract provisions at issue in petitioners' case are common to FmHA promissory notes and security agreements of thousands of family farmers. The FmHA drafted those provisions, and the holding of the Federal Circuit allows the Government to avoid what farmers would reasonably consider to be FmHA's contractual obligation to abide by its own regulations. The decision of the Federal Circuit should be reversed. Justice Jackson's dissent in *Federal Crop Insurance v. Merrill*, 332 U.S. 380, 387 (1947), though written in a slightly different context, rings true:

> It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.

III. Under substantive law not considered by the Claims Court, petitioners set forth genuine issues of material fact. Failing to consider those facts, and instead assuming their absence, the Federal Circuit ignored summary judgment standards defined by this Court.

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934), *quoted in Torncello v. United States*, 681 F.2d 756, 762 (Ct. Cl. 1982). Parties to a contract have "undoubted obligations to fairly deal with one another and act in good faith in performance of a contract." *Squirrel Creek Associates v. United States*, 11 Cl. Ct. 212, 217 (1986), (citing *Louisiana-Pacific Corp. v. United States*, 656 F.2d 650, 652 (Ct. Cl. 1981); Restatement (Second) of Contracts § 205 (1979)). "And, a party vested with discretion must exercise his discretion reasonably and may not do so arbitrarily or capriciously." *Squirrel Creek*, 11 Cl. Ct. at 217 (citation omitted).

In its renewed motion for summary judgment in the Claims Court, respondent argued that it was not an abuse of discretion for the FmHA to take the time it did to approve petitioners' loan. To justify its conclusion respondent offered the affidavit of the County Supervisor who testified that petitioners' application presented a complex financial situation, the FmHA county and state offices were very busy processing other applications, and applicable regulations required completion of a farm and home plan, certification by the County Committee, and review by the State Office prior to approval of petitioners' application. Defendant's Renewed Motion for Summary Judgment,

Appendix 10-15 at 13-14, Cl. Ct. Nos. 142-85C and 143-85C.

In their opposition to respondent's renewed motion for summary judgment, petitioners, by Mr. Smithson's affidavit and by deposition testimony of FmHA officials, set forth in detail a counter statement of facts summarized here. Although petitioners supplied accurate data to the FmHA County Supervisor and worked with him to prepare a correct FHP, the County Supervisor prepared an erroneous, improperly worked up and internally inconsistent FHP that he submitted to the State Office without petitioners' knowledge or approval. C.A. App. 48-49, 256-259, 304-307. The State Office did not approve the FHP and responded by imposing unauthorized preconditions to continued consideration of petitioners' loan application. *Id.* at 307-308, 313-319. Only after intervention by petitioners' accountant did the County Supervisor begin to prepare a new, correct FHP. *Id.* at 140-141.

When the new, correct FHP was finally submitted to the State Office, the County Supervisor sent along a County Committee certification form of borrower eligibility signed by the members of the County Committee, dated March 1, 1984, by the County Supervisor, *but otherwise blank*. *Id.* at 155. The County Supervisor testified that he met with the County Committee on March 1, 1984. Yet at deposition FmHA produced the minutes of all County Committee meetings concerning petitioners. There are no minutes of any meeting on or about March 1, 1984. *Id.* at 179-180, 120-125.

It was on or about March 1, 1984, that petitioners specifically complained to the County Supervisor that the delays were costing petitioners money and threat-

ened planned operations. The County Supervisor responded: "Go tell your Congressman." *Id.* at 50.

By April 1, 1984, petitioners had surrendered 1,977 acres of leased land because it was by then too late to prepare that land and plant crops that would produce a harvest. *Id.* at 46, 50. When FmHA finally approved the loan, petitioners declined it because of their changed circumstances. Petitioners then submitted a revised FHP proposing crop operations on their remaining 210 acres. Their revised FHP required FmHA financial assistance in the form of deferral of loan payments along with the release of chattel security. *Id.* at 50-51, 131-134. FmHA refused to consider the proposed plan and refused to release income security property to pay for necessary farm operating and family living expenses. *Id.* 51, 136.

While in Castro County, the County Supervisor maintained a private, personal file on petitioners. He took that file with him when he left Castro County. After he learned that petitioners had retained counsel, the County Supervisor destroyed his private file on petitioners. *Id.* at 170.

On the basis of the above-recited facts, petitioners argued to the Claims Court that a trier of fact could reasonably find that the delay in approving petitioners' loan had been caused by abuses of discretion and misconduct by FmHA. On the basis of the County Supervisor's affidavit, respondent argued the delay did not reflect an abuse of discretion by any FmHA official and that "all of the facts of this case demonstrate that FMHA officials acted reasonably and in accordance with FmHA regulations." Defendant's Motion for Summary Judgment, Cl.Ct. Nos. 142-85C & 143-85C at 30. Although this controversy as to the reasons for the delay in loan ap-

proval was squarely before the Claims Court, and the Claims Court acknowledged that many facts in the case are disputed (App. A, *infra* 12a), the Claims Court, in its opinion, did not address, and did not determine, whether petitioners had raised a genuine issue as to whether FmHA conduct was arbitrary, capricious, or in bad faith and thus an abuse of FmHA contractual discretion. Rather, the Claims Court decided that it did not have subject matter jurisdiction over petitioners' claims and held that "when, as in the instant case, a plaintiff alleges that the FmHA delays a loan approval or fails to provide alternative loans or loan servicing relief, those claims should be brought as tort actions instead of breach of contract claims." App. A. *infra*, 27a.

In its opinion the Federal Circuit stated that because the Claims Court neither made findings that FmHA had engaged in arbitrary, capricious, culpable or bad faith conduct, nor determined that petitioners had raised a genuine issue as to such conduct, it (the Federal Circuit) was obliged to assume that there was no such evidence before it of FmHA misconduct. App. A. *infra*, 6a. The Federal Circuit said: "We cannot assume its existence, as appellants do." *Id.*

The Federal Circuit implied that it acknowledged FmHA's contractual duty to deal fairly and act in good faith as well as to exercise its contractual discretion reasonably and not arbitrarily and capriciously (App. A. *infra*, 6a, 9a). Given this FmHA contractual duty, *i.e.*, the governing substantive law, and the failure of the Claims Court to reach that very issue, the Federal Circuit (a) should have remanded the case to the Claims Court for a determination as to whether petitioners had raised a genuine issue of material fact, or (b) should, itself, have considered the facts and

determined whether petitioners had raised a genuine issue of material fact. Instead, the Federal Circuit simply assumed, on the ground that the Claims Court had made no findings to the contrary, that the FmHA had acted reasonably and in good faith. To have done so, violated the precepts set forth by this Court with respect to the conditions under which a federal court may grant summary judgment.

This Court held that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This Court also held:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. *The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.*

477 U.S. at 255 (citation omitted; emphasis supplied). The Federal Circuit should have considered the evidence adduced by petitioners. By failing to do so, that court ignored, rather than believed, the evidence of the nonmovants (petitioners) and drew inferences in favor of the movant rather than in favor of petitioners, the nonmovants.

From the facts set forth by petitioners before the Claims Court, before the Federal Circuit, and before this Court, a finder of fact could reasonably decide that the conduct of the FmHA County Supervisor and State Office was arbitrary, capricious, or in bad faith.

This Court should reverse the judgment of the Federal Circuit and remand the case to the Claims Court for trial following this Court's guidance with respect to motions for summary judgment:

> [T]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. at 257.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

STEVE ALEXANDER, ESQ.
ARENS & ALEXANDER
31 East Center Street
Post Office Box 1152
Fayetteville, AR 72702
501/442-0584

Counsel of Record

Of Counsel:

NANCY S. KETTELLE, ESQ.
1700 N. Moore Street
Arlington, VA 22209
703/558-8818

August 1988

JOHN F. ARENS, ESQ.
RICHARD P. ALEXANDER, ESQ.
ARENS & ALEXANDER
31 East Center Street
Post Office Box 1152
Fayetteville, AR 72702
501/442-0584

Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1459

HOWARD SMITHSON and MARETTA SMITHSON,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Claims Court
in CASE NO(S). 143-85 C
This CAUSE having been heard and considered, it is
ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF
THE COURT

DATED May 11, 1988

/s/Francis X. Gindhart
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: June 1, 1988
Costs: Against; Appellant
Printing.....$265.60
Total.....$265.60

87-1459

HOWARD SMITHSON and MARETTA SMITHSON,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

Steve Alexander, Arens and Alexander, of Fayetteville, Arkansas, argued for plaintiffs-appellants. With him on the brief was *Nancy S. Kettelle.*

Terrance S. Hartman, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *M. Susan Burnett*, Assistant Director. Also on the brief was *Daniel Bowen*, Department of Agriculture, of counsel.

Appealed from: U.S. Claims Court

Judge Nettesheim

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1459

HOWARD SMITHSON and MARETTA SMITHSON,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: May 11, 1988

Before MARKEY, *Chief Judge*, DAVIS, *Circuit Judge*, and BALDWIN, *Senior Circuit Judge*

DAVIS, *Circuit Judge.*

The Smithsons, who had made loan and security agreements with the Farmers Home Administration (FmHA) (an agency of the U.S. Department of Agriculture), brought suit in the United States Claims Court for alleged breach of those agreements. The Government moved for summary judgement primarily on the ground that the undisputed and indisputable facts showed that no such breach had occurred. The Claims Court (Nettesheim, J.) granted the Government's motion and dismissed the complaint (reported as *Nutt v. United States*, 12 Cl. Ct. 345 (1987)). The Smithsons appeal. We affirm.

I.

In *Dahl v. United States*, 695 F.2d 1373, 1378-79 (Fed. Cir. 1982), we described the circumstances and procedure in which FmHA makes low-interest loans to farmers who are unable to obtain credit from commercial sources. In its opinion in the current case, the Claims Court summarized this process as follows (12 Cl. Ct. at 347):

The FmHA grants farm operating loans to eligible borrowers who are unable to obtain reasonable financing elsewhere. 7 C.F.R. § 1941 (1983). The FmHA also makes "emergency loans" and various debt servicing options available to farmers, while administering the various loans, grants, and assistance programs under regulations promulgated by the Secretary of the Department of Agriculture.

Loans are made to an eligible borrower only after FmHA determines that the borrower's plan of operation has a reasonable chance of success. 7 U.S.C. § 1941(a)(2) (Supp. 1985); 7 C.F.R. § 1941.12(a)(3) (1983). The FmHA's loan application evaluation process begins when a County Committee (the "Committee"), made up of three local farmers, determines whether a borrower is eligible for a loan. 7 C.F.R. § 1910.4(b). With assistance and recommendations from the County Supervisor, the Committee considers all relevant circumstances about the borrower's farming operation, including the borrower's farming record, proposal for use of the loan proceeds, and statement of the borrower's current financial condition—all as reflected in the Farm and Home Plan (the "FHP") submitted by the borrower. 7 C.F.R. §§ 1910.5, 1941.12. If the Committee finds the borrower to be eligible, it then certifies this result to the County Supervisor, 7 C.F.R. §§ 1941.30, 1945.180.

The County Supervisor has the actual authority to approve a loan. 7 C.F.R. § 1901.2. Once a favorable certification is made by the Committee, the County Supervisor determines whether the plan of operation is feasible and whether the loan is to be used for authorized purposes and can be

> repaid. 7 C.F.R. § 1941.33 (b). After approving a loan, the County Supervisor forwards the loan request to the FmHA state office to issue and forward the loan proceeds. 7 C.F.R. § 1941.33(3).

Appellants Smithson received 15 FmHA loans (farm ownership and emergency) between 1972 and 1983. They executed several loan agreements and five security agreements. The specific circumstances underlying the current suit relate to the Smithsons' further application for FmHA loans and services on January 10, 1984. They then worked with County Supervisor Wolf to devise a FHP (Farm and Home Plan). Early in February 1984, Wolf submitted the Smithson's application to the State Office along with FHP. (Appellants assert that the FHP was improperly based on figures other than those they had supplied to Wolf.) On February 15, 1984, the State Office responded, setting preconditions to the Smithson's continued consideration for loan services. On March 8, 1984, Wolf forwarded to the State Office a March 1, 1984 County Committee certification of eligibility, along with a February 23, 1984 revision of the FHP, which included a loan request for $265,000. By notice dated April 6, 1984, the State Office informed Wolf that the Smithsons' loan was approved. By April 1, 1984, appellants had already surrendered 1,977 acres that they had leased and which they had indicated in the FHP they would farm in 1984. On April 27, 1984, the Smithsons told the FmHA that they intended to decline the loan. In its place, they requested (on May 11, 1984) loan servicing relief such as consolidation, rescheduling, reamortization or deferral. FmHA denied that request (on June 8, 1984). Appellants attempted to appeal the decision within FmHA, but were told that decisions denying loan servicing relief were not appealable.

In their Claims Court suit, the Smithsons argued that, in its 1984 actions, (a) FmHA's regulations were incorporated into their agreements with that agency, (b) FmHA violated several of those incorporated regulations and thus

breached the agreement, and (c) FmHA's delay (asserted to be undue) in processing and approving their 1984 loan application caused them to suffer enormous losses, for which they should be reimbursed. The Claims Court rejected these contentions. On appeal, these arguments are renewed.

II.

Two threshold points need to be made on this appeal. First, though the appellants repeat that FmHA engaged in arbitrary, capricious, culpable and bad faith conduct toward appellants, the Claims Court made no such findings and did not even determine that the Smithsons had raised a genuine issue as to those characterizations (aside from the allegation that the agency breached its own binding regulations); we must therefore assume that, apart from the asserted violation of the regulations and the general allegation of undue delay, there is no evidence before us of such active misconduct. We cannot assume its existence, as appellants do.

Second, because the Smithsons sued for breach of their contracts with FmHA, the Claims Court had initial jurisdiction over the case under 28 U.S.C. § 1491 (the Tucker Act which covers contracts made with the Government). This is not to say that there was jurisdiction over every aspect of the case or every contention advanced by appellants; jurisdiction over the individual points has to be judged separately.

III.

Were the FmHA regulations incorporated into the appellants' contract with the agency so that the Government's alleged breach of those regulations constituted a breach of contract?[1]

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[1] Appellants do not contend that the regulations, in and of themselves, mandate the payment of money. *See e.g., Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967).

The contractual clause that is said to embody this incorporation is the provision of the security agreements that:

> This agreement is subject to the present regulations of the secured party [FmHA] and to its future regulations not inconsistent with the express provisions hereof.

This is hardly the type of clause that should be read as incorporating fully into the contract all the FmHA regulations. First, if that were the parties' purpose, they would have explicitly so provided. Instead, on its face the quoted provision simply says that the contract is "subject" to present and future (consistent) regulations; that appears to say no more than that any *other* contract provision that is contrary to a regulation would be invalid—not that, even though there is no inconsistency, *all* agency regulations are wholly taken into the contractual obligation. Secondly, the clause must refer, not to specific regulations or particular matters, but to the entire corpus of FmHA regulations without exception. Yet it is very highly doubtful that the agency wished to make such a wholesale incorporation of a mass of regulations many of which would probably have nothing specific to do with FmHA's transactions with the Smithsons and some of which are merely hortatory (e.g., "Be sympathetic; try to help the applicant work out the problems").[2] The farmer could then choose among a multitude of regulations as to which he could claim a contract breach—and thus "[a] wholly new ground of obligation would be summarily created by mere implication" (*Eastport Steamship*, 372 F.2d 1002, 1010 (Ct. Cl. 1967)) from a general and ambiguous contract provision in a situation where "only the plainest language could warrant a court in taking [liability] to be imposed." *Pine Hill Co. v. United States*, 259 U.S. 191, 196 (1922). Third,

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[2] In 1984, FmHA's regulations, published in C.F.R., cover more than 1200 pages. 7 C.F.R. §§1900-2045 (1984).

the more natural reading of appellants' complaint is that its incorporation argument states, not a true contractual claim, but a tort claim against the Government for misfeasance and misconduct; that claim is, of course, outside the Claims Court's jurisdiction. *See* 28 U.S.C. § 1491(a)(1) (Claims Court has jursidiction "in cases not sounding in tort"); *Somali Dev. Bank v. United States*, 508 F.2d 817, 820-23 (Ct. Cl. 1974); *McCormick v. United States*, 227 Ct. Cl. 661, 665 (1981).[3]

We, must, therefore, reject appellants' contention that the agency's regulations formed an integral part of the Smithsons' contract with FmHA and that violation of any of those regulations can serve as a proper basis for the complainants' claims of breach of contract.

IV.

Aside from their point that the FmHA regulations were bodily incorporated into these contracts (which we have rejected in Part III, *supra*), the Smithsons rest their claim that the FmHA breached its contract by delaying in 1984 to tender the requested loan funds and other FmHA services on the provision of the security agreements that "Secured party (FmHA) will make or insure future loans or advances to debtor to enable him to raise or harvest farm crops or raise livestock or other animals, provided funds are available and the debtor meets all then current requirements imposed by regulations of the secured party."

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[3] The Smithsons rely on *Dahl v. United States*, 695 F.2d 1373 (Fed. Cir. 1982), for the proposition that the FmHA regulations have been made contractual terms. The *Dahl* opinion did refer gernerally to the contractual arrangement as including "the controlling regulations" (*id.* at 1376), but that general observation had nothing to do with the result of that case and must be regarded as a slight and unnecessary dictum. *McCormick v. United States*, 227 Ct. Cl. 661 (1981), is likewise not helpful on the point of contractual incorporation of FmHA regulations.

To the invocation of this clause the Claims Court responded that (a) FmHA approved the 1984 loan sought by the Smithsons [i.e., "the future loans or advances to the debtor"] who declined it; (b) the clause does not set any time limits or schedules for making the loans or advances; (c) the contract provisions—"future loans or advances"—does not cover the other FmHA services sought by appellants in May 1984 (i.e., loan consolidation, rescheduling, reamortization, and deferral; release of security on existing loans) and accordingly there was no breach of the contract clause; and (d) any undue delay by FmHA in making the loan, or failure to provide alternative loans or loan servicing relief, is vindicable, if at all, only in a tort action of which the Claims Court would have no jurisdiction. We agree with these dispositions and add only that, on the record before us, the 83 days the agency took to approve the 1984 loan does not seem unduly delayed or an abuse of discretion under the loan and security agreements.[4]

V.

It follows that the judgment of the Claims Court dismissing the appellants' complaint must be affirmed.

AFFIRMED.

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[4] We have already put aside (in Part II, *supra*) appellants' unsupported assertions of bad faith and misconduct.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1459

HOWARD SMITHSON and MARETTA SMITHSON,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

MARKEY, *Chief Judge*, concurring.

As the majority correctly states, the Smithson's claim sounds in tort. Thus the Claims Court lacked jurisdiction, as do we. I would dismiss the appeal on that basis.

IN THE UNITED STATES CLAIMS COURT

Nos. 142-85C & 143-85C
(Filed May 15, 1987)

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* * * * * * * * * * * *

GARY NUTT, Plaintiff, v. THE UNITED STATES, Defendant.	* * * \

OPINION

NETTESHEIM, Judge.

These two consolidated actions for breach of express and implied-in-fact contract are before the court on defendant's renewed motion for summary judgment. Argument and supplemental argument have been held. The principal issues, broadly framed, are whether the lending entity has made the Government amenable to suit for breach of contract by incorporating allegedly infracted regulations into a loan document or by stating in the document that it will make or insure future loans or advances to aid the borrower, provided certain conditions are met.

FACTS

Although may facts are disputed, the following have not been controverted. Plaintiffs Gary Nutt and Howard and Maretta Smithson (collectively referred to as "plaintiffs") operate farms in Castro County, Texas. Plaintiffs had outstanding loan agreements with the Farmers Home Administration (the "FmHA"), an agency of the United States Department of Agriculture, at the time the events that give rise to these claims occurred.

The FmHA grants farm operating loans to eligible borrowers who are unable to obtain reasonable financing elsewhere. 7 C.F.R. § 1941 (1983). The FmHA also makes "emergency loans" and various debt servicing options available to farmers, while administering the various loans, grants, and assistance programs under regulations promulgated by the Secretary of the Department of Agriculture.

Loans are made to an eligible borrower only after the FmHA determines that the borrower's plan of operation has a reasonable chance of success. 7 U.S.C. § 1941(a)(2) (Supp. 1985); 7 C.F.R. § 1941.12(a)(3) (1983). The FmHA's

loan application evaluation process begins when a County Committee (the "Committee"), made up of three local farmers, determines whether a borrower is eligible for a loan. 7 C.F.R. § 1910.4(b). With assistance and recommendations from the County Supervisor, the Committee considers all relevant circumstances about the borrower's farming operation, including the borrower's farming record, proposal for use of the loan proceeds, and statement of the borrower's current financial condition—all as reflected in the Farm and Home Plan (the "FHP") submitted by the borrower. 7 C.F.R. §§ 1910.5, 1941.12. If the Committee finds the borrower to be eligible, it then certifies this result to the County Supervisor, 7 C.F.R. §§ 1941.30, 1945.180.

The County Supervisor has the actual authority to approve a loan. 7 C.F.R. § 1901.2. Once a favorable certification is made by the Committee, the County Supervisor determines whether the plan of operation is feasible and whether the loan is to be used for authorized purposes and can be repaid. 7 C.F.R. § 1941.33(b). After approving a loan, the County Supervisor forwards the loan request to the FmHA state office to issue and forward the loan proceeds. 7 C.F.R. § 1941.33(3).[1]

Gary Nutt

Between March 2, 1979, and March 29, 1983, plaintiff Nutt received 14 loans from the FmHA. To ensure payment of these loans, plaintiff and the FmHA executed several loan agreements and four security agreements that gave the FmHA liens of plaintiff Nutt's equipment, crops, and cattle. These security agreements included the following provisions:

IV. IT IS FURTHER AGREED THAT:

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[1] The Federal Circuit described this regulatory framework and procedures in *Dahl v. United States*, 695 F.2d 1372, 1373-79 (Fed. Cir. 1982).

> E. This agreement is subject to the present regulations of the Secured Party and to its future regulations not inconsistent with the express provisions hereof.
>
> . . .
>
> J. Secured Party will make or insure future loan advances [sic. loans or advances] to Debtor to enable him to raise or harvest farm crops or raise livestock or other animals, provided funds are available and the Debtor meets all then current requirements imposed by regulations of the Secured Party.

Although plaintiff Nutt continued to receive credit from the FmHA until 1983, he was cautioned repeatedly by the FmHA to be more diligent in obtaining approval before disposing of items and accounting for the proceeds of sales of crops and cattle in which the FmHA had a security interest.

On July 28, 1983, plaintiff Nutt applied to receive FmHA services to help finance his wheat crop and cattle business. On August 11, 1983, Assistant County Supervisor Dean Saunders prepared a FHP for plaintiff, indicating that plaintiff would need a loan of $54,500. Eight days later the County Committee determined plaintiff to be ineligible for further FmHA services. The County Committee reversed its decision on August 25, 1983, and certified plaintiff as eligible. County Supervisor John Wolf submitted plaintiff's request to the FmHA State Office on August 31, 1983, which plaintiff Nutt alleges was accompanied by a revised financial farm analysis summary. The FmHA State Office rejected plaintiff's loan request on September 21, 1983. Plaintiff Nutt appealed this decision, but it was upheld by a FmHA hearing officer and deputy administrator.

On February 15, 1984, County Supervisor Wolf notified plaintiff Nutt that the FmHA intended to repossess chat-

tels and take other legal action against property in which the FmHA had a security interest. Supervisor Wolf also notified plaintiff Nutt that he could request such loan servicing relief as consolidation, rescheduling, reamortization, or deferral. Plaintiff Nutt applied for consideration of such relief one month later, but Supervisor Wolf denied his application on May 21, 1984. This decision also was upheld on appeal.

The Smithsons

Plaintiffs Smithson received 15 FmHA loans (both farm ownership and emergency) between 1972 and 1983. To ensure payment of these loans, the Smithsons and the FmHA executed several loan agreements and five security agreements. The security agreements contained provisions identical to those signed by plaintiff Nutt.

The Smithsons applied for FmHA services on January 10, 1984, and worked with County Supervisor Wolf later that month to devise a FHP. On February 2, 1984, Supervisor Wolf submitted the Smithsons' application to the State Office along with the FHP. The Smithsons allege that the FHP was based on figures other than those they supplied to Supervisor Wolf. The State Office responded on February 15, 1984, setting preconditions to plaintiffs' continued consideration for loan services. On March 8, 1984, Supervisor Wolf forwarded to the State Office a March 1, 1984 County Committee certification of eligibility, along with a February 23, 1984 revision of the FHP, which included a loan request for $265,000. By notice dated April 6, 1984, the State Office advised Supervisor Wolf that the Smithsons' loan was approved. By April 1, 1984, the Smithsons had surrendered 1,977 acres of land that they had leased and which they had indicated in the FHP they would farm in 1984. The Smithsons notified the FmHA on April 27, 1984, that they intended to decline the loan. Instead, on May 11, 1984, they requested loan servicing relief such as consolidation, rescheduling, reamortization,

or deferral. The FmHA denied the Smithsons' request on June 8, 1984. They attempted to appeal the decision, but were told that decisions denying loan servicing relief were non-appealable.

Both cases were filed in this court on March 11, 1985. Defendant asserted counterclaims in each case for unpaid loan balances, plus interest. Defendant then filed a combined motion to dismiss and motion for partial summary judgment in *Smithson* on December 4, 1985. By order of March 6, 1986, the motion was treated as one for summary judgment, and the court denied the motion in part without prejudice, deferred decision on defendant's motion with respect to its counterclaim, and consolidated the cases. Defendant's renewed motion for summary judgment filed on July 3, 1986, and fully briefed after discovery in March 1987 addresses both cases.

Plaintiffs make claims for five instances of breach of express or implied-in-fact contract, as follows:

1. The FmHA failed to make or insure loans or advances (or subordination loans for plaintiff Nutt), to plaintiffs on a timely basis.

2. The FmHA refused plaintiffs' requests for loan servicing relief (such as consolidation, rescheduling, reamortization, or deferral) on existing loans.

3. The FmHA charged plaintiffs higher rates of interest than the maximum allowed by law on their operating and emergency loans.

4. When plaintiffs experienced income shortfalls below the amounts of income planned, the FmHA refused to consider their requests for release of security.

5. The FmHA refused to consider plaintiffs for "limited resource loan" interest rate (3% below regular FmHA loan interest rates).

DISCUSSION

This court may grant summary judgment under RUSCC 56 when the record shows that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___ 106 S. Ct. 2505, 91 L.Ed. 2d 202 (1986); *accord Johnson Controls, Inc. v. United States*, 8 Cl. Ct. 359, 365 (1985) (citing cases), *aff'd per curiam*, 795 F.2d 1011 (Fed. Cir. 1986). As the opponent of summary judgment, plaintiffs shall " 'receive the benefit of all applicable presumptions, inferences, and intendments.' " *Johnson Controls, Inc.*, 8 Cl. Ct. at 365 (quoting *Orchards v. United States*, 749 F.2d 1571,1574 (Fed. Cir. 1984), *cert. denied*, ___ U.S. ___, 106 S. Ct. 64, 88 L.Ed. 2d 52 (1985)).

There are two central issues to be decided in these cases. The first is the extent to which the FmHA, by making reference in security agreements to the source of controlling law, incorporated all or any FmHA regulations into its loan agreements with plaintiffs such that any deviation by the FmHA from the letter of the law is actionable as a breach of contract. The second issue is whether the FmHA, by including in the security agreements a statement that it "will make or insure future loans or advances" to an incumbent borrower (subject to funding availability and the borrower's compliance with current regulations) obligated itself contractually to provide such loans (or, additionally, all loan servicing actions) to qualified applicants.

1. Jurisdiction in this court under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1982), may be "founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." To recover money damages against the United States, a litigant must point either to some statute mandating the

payment of money by the Government or to a breach of an express or implied-in-fact contractual obligation of the Government. *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967). "Monetary claims which cannot be brought within these limits are beyond this court's jurisdiction, even though they may intimately involve the Constitution, an Act of Congress, or an executive regulation." 178 Ct. Cl. at 607, 372 F.2d at 1008.

The Court of Claims in *Eastport* gave a very thorough and cogent explication of the range of the Court's jurisdiction. In refusing to find that the statute allegedly violated by the Maritime Commission was money-mandating, the court warned of the danger invited by a court's reading money-mandating status into a statute when that meaning is not clearly expressed by the statute. "If we were to infer from . . . [the statute] an unexpressed summons to compensate plaintiff for its business loss, we would necessarily have to open the doors to similar claims by other applicants who suffer commercial damage from a wrongful denial of a license or permission by these other agencies (*or as a result of the agency's improper refusal to act*). . . ."

178 Ct. Cl. at 608, 372 F.2d at 1009 (emphasis added; footnote omitted). The court noted its responsibility to respect the bounds of its jurisdiction:

> [W]e must follow the admonition of the Supreme Court, almost a century ago, 'to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that Government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own

> determination. It certainly has not conferred it on the Court of Claims.' *Gibbons v. United States, supra*, 75 U.S. (8 Wall.) [269] at 275-76 [19 L.E. 453].

178 Ct. Cl. at 611, 372 F.2d at 1011 (footnote omitted).

The implications of redressing under this court's jurisdiction over contract claims an alleged infraction of regulations are not to be underestimated. Judicial review, in any case, does exist. The question is whether review should be confined strictly to judicial monitoring under the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-03 (1982) (the "APA"), of an agency's observance of its congressional prescriptives, or whether the matter should be viewed as one between two contracting parties and a court properly should interpose itself as a referee deciding the rights and responsibilities of the contracting parties. This conceptual dilemma was illustrated recently by the Supreme Court in a similar context. In *Wright v. City of Roanoke Redev. & Hous. Auth.*, ___ U.S. ___, 107 S. Ct. 766, 93 L.Ed. 2d 781 (1987), tenants in low income housing projects sued under 42 U.S.C. § 1983 (1982), alleging a deprivation of federal rights by a housing authority because the Brooke Amendment to the Housing Act of 1937 allegedly imposed a rent ceiling that the housing authority had violated by overbilling the tenants for their utilities. A divided court held that the benefits Congress intended to confer on the tenants were sufficiently specific and definite to qualify as enforceable federal rights under section 1983. Although the holding is not germane, the dissent, in arguing that a statutory entitlement to judicial enforcement had not been created, pointed instead to a lease provision that gave the tenants the right to enforce their overbilling charges as a matter of contract law:

> HUD has developed a standard lease reflecting these requirements, *see* HUD Circular RHM 7465.8 (Feb. 22, 1971), which respondent's leases

> closely follow. Thus, respondent is contractually obligated to furnish, "as reasonably necessary," "hot and cold water, gas for cooking, electricity for lighting and general household appliances and heat at appropriate times of the year, and also range and refrigerator." If respondent fails to fulfill these obligations, petitioners may, like any other tenants, bring suit for breach of contract.

Id. 107 S.Ct. at 779-80 (O'Conner, J., dissenting). This contract provision is the kind of explicit undertaking that, it is submitted, should be actionable in a court of law as a claim based on contract. The provision in the cases at bar incorporating wholesale an agency's regulations, attendant on no particular undertaking, are wholly dissimilar. The provision obligating the FmHA to make and insure future loans to aid a borrower, provided certain conditions are met, would seem to touch the outer limits of recognized contractual undertakings.

Judicial review under the APA and under contract theories has different theoretical justifications and serves different functions. Under the APA an aggrieved individual can seek review in federal district court to correct what he alleges to be an abuse of discretion by a government agency. The individual asks the court to compel the agency to change its behavior to conform to the requirements of controlling law. The value of such action is that it both compels the Government to comply with the law and enables the agency to correct its behavior on matters that often involve many others beyond the immediate plaintiff who are affected by programs granting benefits from the Government.

Review of contract claims justifiably is more limited and subject to very stringent requirements. Since the Government can incur money damages in a contract action, the Government will be held to have obligated itself in contract only upon a showing of an express or implied-in-fact agreement to do so. This formidable standard serves to protect

the fisc from all suits under contract claims except where the evidence guarantees with some certainty that the Government has agreed to waive its sovereign immunity. *See United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed. 2d 114 (1976). It also assures a necessary measure of flexibility to the Government in its daily operations so that it need not answer in damages for each false step or innocent legal error in administering the myriad of programs and functions that occupy its efforts.

The distinction between these two sorts of actions and their respective remedies is essential to the proper balance between protecting the justifiable, bargained-for expectations of the public and the proper exercise of discretion necessary to the smooth and efficient operation of the Government. It is important that a mere reference in the contract to the controlling regulations not be converted into a contractual promise at the risk of subverting this crucial distinction.

2. Plaintiffs in these cases make no claim that any of the statutes relied upon is money-mandating. Rather, they contend that a variety of FmHA regulatory duties and procedures became contractual obligations of the FmHA through a reference to the regulations in their contracts. These alleged obligations will be examined separately. Plaintiffs also claim that the FmHA contractually obligated itself to "make or insure future loans or advances" to plaintiffs, if qualified, by the FmHA's inclusion of that language in its security agreements with plaintiffs. Since the Smithsons' loan application was approved, their grievance under this claim is not that they were denied a loan, but that the FmHA failed to consider their application in a timely fashion. The Smithsons argue that this failure was a breach of contract since, they contend, FmHA regulations require timely processing of loan applications and the security agreements incorporated these regulatory requirements as contractual obligations. Plaintiff Nutt, on

the other hand, contends that the regulations were violated in the processing of his request for loan servicing.

Unless a statute or regulation is money-mandating, the Government creates no legal right enforceable in the Claims Court to money damages by violating it. Yet, when entering into contracts, the Government may include any number of promises to conduct itself in a certain way, for example, by restating regulatory procedures and duties as contractual obligations of the Government. If the Government then violates those regulations, it may become liable for damages for breach of contract. *See Dahl v. United States*, 695 F.2d 1373, 1376, 1381 (Fed. Cir. 1982). Similarly, the Government may exact promises from a party with whom it contracts that he will comply with all pertinent regulations. A violation of one of those regulations by the contracting party then becomes a breach of the contract. *See Dahl v. United States*, 695 F.2d at 1379; *Pettersen v. United States*, 10 Cl. Ct. 194, 199, *aff'd mem.*, 807 F.2d 993 (1986); *cf. Gross v. United States*, 205 Ct. Cl. 605, 613, 505 F.2d 1271, 1275-76 (1974) (Government's refusal to allow plaintiff's participation in agricultural program justified by plaintiff's violation of applicable regulations). However, these cases leave unclear the issue of how specific the contract's reference to regulations must be before they become contractual promises by the Government.

In *Pettersen* the court reaffirmed an administrative determination that a group of farmers had breached a contract with the Commodity Credit Corporation (the "CCC") by failing to limit the acreage of their crops, as required by an express contract term. In a separate term, both the farmers and the CCC agreed to comply with several specific regulations incorporated into the contract and included in the appendix to the contract. Although the court found both that the Government had not breached any part of the contract and that plaintiffs had breached a non-regulatory provision of the contract, the court did ex-

amine plaintiffs' allegation that the Government had violated one of the regulations incorporated into the contract. The court's willingness to entertain the claim supports the argument by plaintiffs in the instant cases that the Government's violation of a regulation incorporated into a contract can be the basis for a breach of contract action against the Government. However, the facts peculiar to *Pettersen* restrict the breadth of its holding. It is not insignificant, first, that the language incorporating the regulations was very precise: "The operator and each producer on the farm and CCC agree to comply with the terms and conditions specified in the Appendix to this contract." *Pettersen*, 10 Cl. Ct. at 198. Second, the regulations included in the appendix were specific and limited in number, as opposed to a wholesale incorporation of all applicable regulations.

Gross offers even less guidance. That case involved a dispute over payments made to a farmer under the Department of Agriculture's Feed Grain Programs. Although the Court of Claims analyzed violations of the regulations by both the Government and the farmer, the opinion never refers to any particular contract that might have incorporated the mentioned regulations. Instead, the court used the farmer's violation of several regulatory provisions and the Government's adherence to the regulations to justify the Government's decision to deny the farmer's participation in the Feed Grain Programs for one year and to seek a refund of monies paid to the farmer during other years. The interplay, if any, between the regulations and whatever contract may have been involved was left unstated.

Finally, in *Dahl*, the Federal Circuit examined an FmHA promissory note and security agreement, both of which contained the following language: "This note [or agreement] shall be subject to the present regulations of the Farmers Home Administration and to its future regulations not inconsistent with the express provisions hereof."

695 F.2d at 1376. The court stated, "The terms of the parties' agreement, including the controlling regulations, were incorporated into the promissory note and security agreement." *Id.* Plaintiffs had used the proceeds of an interim bank loan, to be repaid from an approved FmHA loan, to purchase real estate instead of personal property and had also increased their personal debt liability after approval of the FmHA loan. The FmHA then refused to release the proceeds of its loan and unilaterally closed a supervised bank account in which the funds had been deposited and withdrew the loan proceeds. Reversing the trial court, the Federal Circuit held that the FmHA was justified under the regulations in taking such action and therefore had not breached the contract. 695 F.2d at 1379. The court also ruled that plaintiffs had breached the contract because they had violated regulations prohibiting the use of loan funds to be used to purchase real estate. *Id.*

Interestingly, even though the implications of *Dahl* are that the FmHA had a duty under the contract to comply with all applicable regulations and that its alleged breach of contract was analyzed against that assumption, the appellate court's ultimate determination that the FmHA had not breached the contract by refusing to disburse the funds to plaintiffs does not reveal whether that duty to disburse owed its presence in the contract to incorporation from the regulations or, rather, was simply an express or implied term of the contract apart from any regulation. Because the court did not disclose whether the contract duty of the FmHA that it was examining had its origin in the regulations, it is not certain that *Dahl* stands for the proposition that the FmHA contract language quoted in that case created a contractual obligation by the FmHA to comply with all applicable regulations, violation of which can be the basis for breach of contract damages against the Government.

If the FmHA's contractual duty examined in *Dahl* had a non-regulatory origin, the court's observation that the

quoted language served to incorporate the "controlling regulations" can be considered to refer only to plaintiffs' regulatory obligations under the contract (which were the basis of the court's ruling that plaintiffs had breached the contract) and to be dictum concerning the FmHA's contractual obligations. The court simply noted that the regulations allowed the FmHA to close the bank account unilaterally and that plaintiffs' breach or default "was enough to authorize the unilateral termination of the account and loan." 695 F.2d at 1380. Such an analysis does not allow the inference that a regulation-based contractual obligation of the FmHA was at issue in that case. Therefore, despite *Dahl's* statement that the "controlling regulations . . . were incorporated into the promissory note and security agreement," *id.* at 1376, it is not certain that the court would have interpreted the incorporating clause of the contract to create a contractual obligation by the FmHA to comply with all applicable regulations and to be liable to suffer money damages for any deviation from them.

3. *The Smithsons.* The Smithsons claim that the FmHA's delays in processing and finally approving their loan application caused them to suffer economic losses. They argue that the FmHA owed them a contractual duty to process their application in a timely fashion.[2] They cite 7 C.F.R. § 1910.6(a) (1983), which describes the sequence of events that should occur after an applicant has been deemed eligible for a loan. The Smithsons assert that the

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[2] During argument the Smithsons contended that in addition to approving their first loan request too late, the FmHA failed to consider a second loan application. However, this was their first mention of a second application. Neither their complaint nor their amended complaint states any claim based on a second application. By the time for argument on a motion for summary judgment (indeed, defendant's second such motion), it is far too late to amend the pleadings to add another claim, nor have the Smithsons moved to amend their complaint again.

process described by the regulation became a contractual obligation of the FmHA to process applications "promptly" according to the process because the regulations were incorporated into their security agreement by section IV. E. of the agreement, which, again, reads: "This agreement is subject to the present regulations of the Secured Party and to its future regulations not inconsistent with the express provisions hereof."

The Smithsons argue that this contract term incorporated all applicable regulations into the contract as affirmative obligations of the Government. Although this contract language is nearly identical to the contract provision in *Dahl*, the opinion in *Dahl* cannot be read as broadly as the Smithsons advocate. Had the FmHA intended to convert its FmHA regulatory duties into contractual obligations, it could have employed the language it used in *Pettersen*, *i.e.*, that the parties "agree to comply with the terms and conditions [including various regulations] specified in the Appendix to this contract." 10 Cl. Ct. at 198. Or, the FmHA could have drafted the term to state simply that the parties agreed to comply with all applicable regulations. Instead, the language that was included is far more susceptible to an interpretation that the terms and obligations of the contract would be both construed according to present regulations and subject to changes in the regulations not inconsistent with the contract's express provisions. Viewed in this way, the contract establishes the FmHA's regulations as a backdrop to, and occasional modifier of, express contractual obligations.

It is unreasonable to infer that the FmHA meant to obligate itself in wholesale fashion to comply with each FmHA regulation or risk breach of contract damages. Absent both an en masse incorporation of regulations and express or implied contractual promises by the FmHA to evaluate loan applications according to some time schedule,

the Smithsons' breach claim based on timeliness must fail.[3]

McCormick v. United States, 227 Ct. Cl. 661 (1981), fails to add any merit to plaintiffs' claims based on timeliness. Plaintiff farmers in *McCormick* characterized the FmHA's alleged "improper supervision" of their loans as a breach of contract between the parties. The alleged improper supervision occurred because the County Supervisor had not closed plaintiffs' loans until after planting season had passed and then refused to grant them additional loans or modify their repayment schedule. Although the court's abbreviated discussion of the law, citing no cases on this issue, appears to indicate that abuse of discretion by an agency official may be grounds for a breach of contract claim, the court dismissed the case on summary judgment because plaintiffs had furnished no facts or allegations even tending to show an abuse of discretion. 227 Ct. Cl. at 664-65. More importantly, the court's alternative ground for finding no breach of contract was that plaintiffs' claim of abuse of discretion "is more properly characterized as alleging negligent misconduct on the part of" the County Supervisor and that "such a claim, sounding in tort, is not within this court's original jurisdiction. . . ." *Id.* at 665. That holding instructs that when, as in the instant case, a plaintiff alleges that the FmHA delays a loan approval or fails to provide alternative loans or loan servicing relief, those claims should be brought as tort actions instead of breach of contract claims. Furthermore, *McCormick* never explains what contractual obligation the FmHA undertook or the source of the obligation and therefore does nothing to bolster plaintiffs' claims here.

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[3] The damages claimed by the Smithsons appear to include sums for loss of their farming operation and harm to their reputation in their community. Such damages are consequential in nature, and are not recoverable in this court. *Northern Helix Co. v. United States*, 207 Ct. Cl. 862, 886-87, 524 F.2d 707, 714-15 (1975), *cert. denied*, 429 U.S. 866, 97 S.Ct. 176, 50 L.Ed. 2d 146 (1976) (only actual damages recoverable in breach of contract suit in this court).

By contrast to plaintiffs' claim based on an incorporation of FmHA regulations, their claims based on the FmHA's statement in ¶ IV. J. that the FmHA "will make or insure future loans or advances to Debtor to enable him to raise or harvest farm crops or raise livestock or other animals, provided funds are available and the Debtor meets all then current requirements imposed by regulations" of the FmHA are grounded in contractual language more easily construed as an express promise by the FmHA. Whatever the motivation that prompted the FmHA to restate its loan policy as an affirmative contractual obligation toward an incumbent borrower, the language is clear. The FmHA's agreement to "make or insure future loans or advances" sufficiently supports plaintiffs' allegation that the FmHA obligated itself by that language, so that defendant's renewed motion for summary judgment would be denied if the Smithsons' claims were based on the FmHA's failure to "make or insure future loans or advances." However, the Smithsons received the loan they sought. They now complain that they were denied such other FmHA services as loan consolidation, rescheduling, reamortization, and deferral; release of security on existing loans; and a "limited resource loan" interest rate. In examining the plain meaning of the phrase "future loans or advances," there is no indication that the above-mentioned loan servicing actions are included. The FmHA did not violate its obligation to make or insure future loans by its alleged failure to provide various loan servicing actions. That the same application and same financial information might be used for both purposes does not serve to convert a promise to "make or insure future loans or advances" into one to provide all other loan servicing actions. If the FmHA had meant to bind itself to provide all loan servicing actions, too, it could have separately enumerated them in ¶ IV. J. or promised generally to provide all financial loan services available under FmHA programs. It did neither, and the contract provision must be given a plain reading of its

intended meaning. The Smithsons' claims in counts 2 and 4 must fail as a matter of law.

Count 5 of the Smithsons' complaint claims that the FmHA breached the loan agreements by failing to consider them for a "limited resource loan" interest rate. It is unclear whether this loan-related option falls within the ambit of the "make or insure future loans or advances" language or whether plaintiffs seek to base this obligation on the alleged incorporation of the regulations. However, even giving it the interpretation most favorable to the Smithsons, *i.e.*, as an auxiliary to the "make or insure future loans," this count fails because the Smithsons' request for a loan was approved by the FmHA.

Defendant has counterclaimed for the outstanding balance of eight loans made by the FmHA to the Smithsons. The total outstanding principal on these loans was $377,662.61 on the date defendant filed its counterclaim, July 25, 1985. In their answer the Smithsons admitted that the loans were made and were outstanding obligations. However, by way of defenses, they asserted alternatively that the FmHA failed to satisfy a condition precedent to the loan agreements by breaching either a duty to make or insure future loans or advances in a timely manner or a duty to provide other loan servicing actions. The Smithsons also had claimed under count 3 for the amount of interest charged them by the FmHA on their emergency loans in excess of the maximum rate allowed by law. The gravamen of this claim is that the FmHA failed to recompute its interest rates often enough and that the interest rates charged the Smithsons exceeded, at the time the various loans were made, the maximum amount allowed under the formula set forth in FmHA regulations. During supplemental argument counsel for the Smithsons advised that this claim was in the nature of an offset to defendant's counterclaim and did not seek recovery of amounts already paid.

4. *Gary Nutt.* For the reasons stated above with regard to the Smithsons' claims based on an incorporation of the regulations into the contract, plaintiff Nutt's claims based on failure to provide loan servicing relief and release of security fail. Defendant's renewed motion for summary judgment is granted as to these claims.

Plaintiff Nutt was denied an operating loan. His breach of contract claim for failure to provide this loan survives defendant's motion because of the express contractual promise made to him by the FmHA to "make or insure future loans or advances."[4] This claim must be tried. Since plaintiff Nutt's claim for a "limited resource loan" interest rate may be encompassed within the "make or insure loans or advances" language of his claim under count 1, count 5 must be tried also.

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[4] To the extent that plaintiff Nutt's breach claim based on failure to "make or insure future loans or advances" seeks relief for the FmHA's alleged failure to consider him for loan subordination, First Amended Compl. filed Mar. 12, 1987, ¶¶ 2-3, this portion of the claim must be dismissed. During supplemental argument, counsel for plaintiff Nutt contended that the contractual language, "insure," was broad enough to encompass the concept of loan subordination. However, the distinctly separate treatment of these two terms in both the statutes and the regulations makes clear the different loan functions served by each.

Congress has provided FmHA authority to insure both operating loans, 7 U.S.C. §§ 1928, 1947, and emergency loans, 7 U.S.C. § 1968, and has defined "insure" as a distinct term meaning "to guarantee the payment of a loan originated, held, and serviced by a private financial agency or other lender approved by the Secretary." 7 U.S.C. § 1991(a). Additionally, an "insured loan" can be one "directly made and serviced by the FmHA as the lender with funds from the Rural Development Insurance Fund, Rural Housing Insurance Fund, or Agricultural Credit Insurance Fund." 7 C.F.R. § 1980.6(a)(10). By contrast, the procedure that allows FmHA chattel liens securing the existing operating, emergency, and economic emergency loans to "be subordinated to a lien of another creditor to permit that creditor to lend" to the borrower is set out separately as a loan servicing option at 7 C.F.R. § 1962.30.

Plaintiff Nutt also makes a claim, that really is a defense to defendant's counterclaim, for excess interest charged on operating and emergency loans. This claim is supported by disputed material facts concerning the FmHA's interest computing practices and therefore survives defendant's motion. Because plaintiff Nutt also has asserted a breach of contract defense (the FmHA's failure to make or insure future loans) against defendant's counterclaim for the outstanding balance owed by plaintiff Nutt on his loans and because this breach issue has withstood defendant's motion, the counterclaim must also await trial. Summary judgment as to defendant's counterclaim therefore is denied.

5. Pursuant to RUSCC 56(e), the following material facts are in dispute:

Plaintiff Nutt's claim for failure to "make and/or insure future loans:"

a. Whether plaintiff Nutt failed to account for security items and/or the proceeds therefrom (1979-81).

b. Whether plaintiff Nutt's loan application and supporting information, as supplied by him, should have established his creditworthiness.

Plaintiff Nutt's interest overcharge claims:

a. How often FmHA actually recomputed interest rates.

b. Which of plaintiff Nutt's loans is the interest rate in excess of the statutory maximum interest rate.

CONCLUSION

Based on the foregoing,

IT IS ORDERED, as follows:

1. Defendant's renewed motion for summary judgment is granted insofar as the complaint in No. 142-85C will be

dismissed as to counts 2 and 4 (incorporated by reference in the First Amended Complaint) and ¶¶ 1-4 of the First Amended Complaint, is denied as to counts 3 and 5 and defendant's counterclaim. Defendant's motion further is granted to the extent that count 1 of the complaint charges that the alleged obligation to "make and/or insure future loans" had to be discharged in a timely fashion.

2. Defendant's renewed motion for summary judgment is granted insofar as the complaint in No. 143-85C will be dismissed. Dismissal of the complaint deprives the court of jurisdiction over defendant's counterclaim, as well. The Clerk of the Court shall dismiss both the complaint in 143-85C and defendant's counterclaim.

3. Further proceedings pursuant to Appendix G are scheduled by separate order entered this date.

7 U.S.C. § 1921. Congressional findings

The Congress finds that the statutory authority of the Secretary of Agriculture, hereinafter referred to in this chapter as the "Secretary," for making and insuring loans to farmers and ranchers should be revised and consolidated to provide for more effective credit services to farmers.

(Pub. L. 87-128, title III, § 301(b), Aug. 8, 1961, 75 Stat. 307.)

7 U.S.C. § 1941. Persons eligible for loans

(a) The Secretary is authorized to make and insure [operating] loans under this subchapter to farmers and ranchers in the United States, . . . subject to the conditions specified in this section. To be eligible for such loans, applicants who are individuals . . . must (1) be citizens of the United States, (2) have either training or farming experience that the Secretary determines is sufficient to assure reasonable prospects of success in the proposed farming operations, (3) be or will become operators of not larger than family farms . . . and (4) be unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time.

(Pub. L. 87-128, title III, § 311, Aug. 8, 1961, 75 Stat. 310; Pub. L. 92-419, title I, § 120(a), Aug. 30, 1972, 86 Stat. 665; Pub. L. 95-334, title I, § 114, Aug. 4, 1978, 92 Stat. 425; Pub. L. 97-98, title XVI, § 1601(b), Dec. 22, 1981, 95 Stat. 1346.)

7 U.S.C. § 1942. Purposes of loans; grants for pollution abatement and control projects, limitations

(a) Loans may be made under this subchapter for (1) paying costs incident to reorganizing the farming system

for more profitable operation, (2) purchasing livestock, poultry, and farm equipment (including equipment which utilizes solar energy), (3) purchasing feed, seed, fertilizer, insecticides, and farm supplies and to meet other essential farm operating expenses including cash rent, (4) financing land and water development, use, and conservation, (5) without regard to the requirements of section 1941(a)(2) and (3) of this title, to farmers or ranchers to finance outdoor recreational enterprises or to convert to recreational uses their farming or ranching operations, including those heretofore financed under this chapter, (6) enterprises needed to supplement farm income, (7) refinancing existing indebtedness, (8) other farm and home needs including but not limited to family subsistence, (9) loan closing costs, (10) for assisting farmers or ranchers in effecting additions to or alterations in the equipment, facilities, or methods of operation of their farms or ranches in order to comply with the applicable standards promulgated pursuant to section 655 of title 29 or standards adopted by a State pursuant to a plan approved under section 667 of title 29, if the Secretary determines that any such farmer or rancher is likely to suffer substantial economic injury due to such compliance without assistance under this paragraph, and (11) assisting farmers and ranchers in reducing their dependence on nonrenewable energy resources through the development and construction of solar energy systems, including the modification of existing systems. For the purposes of this subchapter, the term "solar energy" means energy derived from sources (other than fossil fuels) and technologies included in the Federal Non-Nuclear Energy Research and Development Act of 1974, as amended [42 U.S.C. 5901 et seq.].

(Pub. L. 87-128, title III, § 312, Aug. 8, 1961, 75 Stat. 310; Pub. L. 87-703, title IV, § 401(4), Sept. 27, 1962, 76 Stat. 632; Pub. L. 90-488, § 8, Aug. 15, 1968, 82 Stat. 771; Pub. L. 92-419, title I, §§ 120(b), 121, Aug. 30, 1972, 86 Stat. 665, Pub. L. 95-113, title XIV, § 1448(b), Sept.

29, 1977, 91 Stat. 1012; Pub. L. 95-334, title I, § 115, Aug. 4, 1978, 92 Stat. 425; Pub. L. 96-438, § 1(3), Oct. 13, 1980, 94 Stat. 1871.)

7 U.S.C. § 1946. Liability of borrower; determination of interest rates; payment period; consolidation and rescheduling of loans

(a)(1). . . .

(2) The interest rate on any loan (other than a guaranteed loan) to a low-income, limited resource borrower under this subtitle shall be the interest rate otherwise applicable under this section reduced by 3 per centum per annum.

* * * *

(b) Loans made under this subchapter shall be payable in not to exceed seven years. The Secretary may consolidate or reschedule outstanding loans for payment over a period not to exceed seven years from the date of such consolidation or rescheduling, and the amount of unpaid principal and interest of the prior loans so consolidated or rescheduled shall not create a new charge against any loan levels authorized by law. A new loan may be included in a consolidation. Such new loan shall be charged against any loan level authorized by law. The interest rate on such consolidated or rescheduled loans, other than guaranteed loans, may be changed by the Secretary to a rate not to exceed the rate being charged for loans made under this subchapter at the time of the consolidation or rescheduling. The interest rate on any guaranteed loan under this subchapter that may be consolidated or rescheduled for payment shall be such rate as may be agreed upon by the borrower and the lender, but not in excess of a rate as may be determined by the Secretary.

(Pub. L. 87-128, title III, § 316, Aug. 8, 1961, 75 Stat. 311; Pub. L. 90-488, § 10, Aug. 15, 1968, 82 Stat. 771;

Pub. L. 95-334, title I, § 117, Aug. 4, 1978, 92 Stat. 426; Pub. L. 97-35, title I, § 160(b), Aug. 13, 1981, 95 Stat. 377.)

7 U.S.C. § 1946. Liability of borrower; determination of interest rates; payment period; consolidation and rescheduling of loans

[*See main edition for text of (a)*]

(b) Loans made under this subchapter shall be payable in not to exceed seven years. The Secretary may consolidate or reschedule outstanding loans for payment over a period not to exceed seven years (or, in the case of loans for farm operating purposes, fifteen years) from the date of such consolidation or rescheduling, and the amount of unpaid principal and interest of the prior loans so consolidated or rescheduled shall not create a new charge against any loan levels authorized by law. A new loan may be included in a consolidation. Such new loan shall be charged against any loan level authorized by law. Except as otherwise provided for farm loans under section 1981b of this title, the interest rate on such consolidated or rescheduled loans, other than guaranteed loans, may be changed by the Secretary to a rate not to exceed the rate being charged for loans made under this subchapter at the time of the consolidation or rescheduling. The interest rate on any guaranteed loan under this subchapter that may be consolidated or rescheduled for payment shall be such rate as may be agreed upon by the borrower and the lender, but not in excess of a rate as may be determined by the Secretary.

(As amended Pub. L. 98-258, title VI, § 604(b), Apr. 10, 1984, 98 Stat. 139.)

AMENDMENTS

1984—Subsec. (b), Pub. L. 98-258 inserted "(or, in the case of loans for farm operating purposes, fifteen years)"

and substituted "Except as otherwise provided for farm loans under section 1981b of this title, the interest rate" for "The interest rate".

EMERGENCY AGRICULTURAL CREDIT

Pub. L. 95-334, title II, §§ 201 to 211, Aug. 4, 1978, 92 Stat. 429-433, as amended by Pub. L. 96-220, § 1, Mar. 30, 1980, 94 Stat. 129; Pub. L. 97-98, title XVI, § 1605. Dec. 22, 1981, 95 Stat. 1346, provided that:

"SHORT TITLE

"SEC. 201. This title may be cited as the 'Emergency Agricultural Credit Adjustment Act of 1978'.

"AUTHORITY TO INSURE ON GUARANTEE LOANS

"SEC. 202. The Secretary of Agriculture may insure or guarantee loans to (1) bona fide farmers and ranchers who are primarily and directly engaged in agricultural production and who are citizens of the United States and (2) . . . if the applicant for such loan—

"(A) has the experience or training and resources necessary to assure a reasonable prospect for successful operation with the assistance of such loan;

"(B) needs such credit in order to maintain a viable agricultural production operation; and

"(C) is not able to obtain sufficient credit elsewhere due to economic stresses, such as a general tightening of agricultural credit or an unfavorable relationship between production costs and prices received for agricultural commodities.

• • • •

"PURPOSES OF LOANS

"SEC. 203. (a) Loans may be insured or guaranteed under this title for (1) refinancing outstanding indebted-

ness, including the making of installment payments of principal and interest, on farm or home real estate and other farm and essential home debts that cannot be paid unless assistance is provided under this title to provide adequate terms within the applicant's repayment ability and assure continuation of the applicant's farming, ranching, or aquaculture operation: *Provided*, That no loan may be insured or guaranteed under this title for the purpose of refinancing outstanding indebtedness on farm or home real estate unless such real estate was purchased by the applicant at least one year prior to the date of the loan application, (2) reorganization of the farming, ranching, or aquaculture operation, including changes in the nature or method of operation, necessary to provide an economically sound operating unit, (3) purchase of essential water rights, supplies, and irrigation facilities, (4) purchase of essential livestock, poultry, and farm equipment, (5) purchase of feed, seed, fertilizer, insecticides, and farm supplies and other essential farm operating expenses, including cash rent, (6) financing essential land and water development, use, and conservation , (7) other essential farm, ranch, and aquaculture needs, including, but not limited to, family subsistence, and (8) loan closing costs. No loan may be insured or guaranteed under this title the purpose of which is to purchase or lease additional land.

"(b) In making loans under this title, preference shall be given to owners of operators of not larger than family farms.

• • • •

"ISSUANCE OF CERTIFICATES OF BENEFICIAL OWNERSHIP:
CONTRACTS OF GUARANTEE ASSIGNABLE: regulations

"SEC. 209. (a). . . .

"(b). . . .

"(c) The Secretary is authorized to issue such regulations as the Secretary determines necessary to carry out this title. Final regulations shall be issued as soon as possible, but in no event later than thirty days after the date of enactment of this title [Aug. 4, 1978]. Insofar as practicable, the Secretary shall complete action on each loan application within thirty days after its receipt.

7 U.S.C. § 1961. Eligibility for loans

(a) Persons eligible

The Secretary shall make and insure [emergency] loans under this subchapter only to the extent and in such amounts as provided in advance in appropriation Acts of (1) established farmers, ranchers, or persons engaged in aquaculture, who are citizens of the United States, . . . where the Secretary finds that the applicants' farming, ranching, or aquaculture operations have been substantially affected by a natural disaster in the United States or by a major disaster or emergency designated by the President under the Disaster Relief Act of 1974 [42 U.S.C. 5121 et seq.]: *Provided*, That they have experience and resources necessary to assure a reasonable prospect for successful operation with the assistance of such loan and are not able to obtain sufficient credit elsewhere.

(b) Person able to obtain credit elsewhere

Notwithstanding the credit elsewhere requirements of subsection (a) of this section and section 1983(a) of this title, the Secretary shall implement a program under which the Secretary may make or insure loans under this subchapter to applicants able to obtain sufficient credit elsewhere, subject to the other terms and conditions for loans made or insured under this subchapter and such other terms and conditions as the Secretary may, by regulation, prescribe.

(c) Family farm system

The Secretary shall conduct the emergency loan program under this subchapter in a manner that will foster and encourage the family farm system of agriculture, consistent with the reaffirmation of policy and declaration of the intent of Congress contained in section 2266(a) of this title.

(d) Definitions

For the purposes of this subchapter—

(1) "aquaculture means the husbandry of aquatic organisms under a controlled or selected environment; and

(2) "able to obtain sufficient credit elsewhere" means able to obtain sufficient credit elsewhere to finance the applicant's actual needs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near which the applicant resides for loans for similar purposes and periods of time.

(Pub. L. 87-128, title III, § 321, Aug. 8, 1961, 75 Stat. 311; Pub. L. 87-832, Oct. 15, 1962, 76 Stat. 958; Pub. L. 93-24, §§ 2, 3, 6, Apr. 20, 1973, 87 Stat. 24, 25; Pub. L. 93-237, § 10(a), (d), Jan. 2, 1974, 87 Stat. 1025; Pub. L. 94-68, §§ 2, 3, Aug. 5, 1975, 89 Stat. 381; Pub. L. 95-334, title I, § 118, Aug. 4, 1978, 92 Stat. 426; Pub. L. 96-302, title I, § 120(a), July 2, 1980, 94 Stat. 841; Pub. L. 96-438, § 3(a), (b)(1), Oct. 13, 1980, 94 Stat. 1872; Pub. L. 97-35, title I, § 161, Aug. 13, 1981, 95 Stat. 378.)

7 U.S.C. §1963, Purpose and extent of loans

Loans may be made or insured under this subchapter for any purpose authorized for loans under subchapter I or II of this chapter and for crop or livestock changes deemed desirable by the applicant, subject to the limita-

tions on the amounts of loans provided in section 1964(a) of this title.

(Pub. L. 87-128, title III, § 323, Aug. 8, 1961, 75 Stat. 311; Pub. L. 96-438, § 3(b)(1), Oct. 13, 1980, 94 Stat. 1873.)

7 U.S.C. § 1970. Eligibility for assistance based on production loss

The Secretary shall make financial assistance under this subchapter available to any applicant seeking assistance based on production losses if the applicant shows that a single enterprise which constitutes a basic part of the applicant's farming, ranching, or aquaculture operation has sustained at least a 30 per centum loss of normal per acre or per animal production, or such lesser per centum of loss as the Secretary may determine, as a result of the disaster based upon the average monthly price in effect for the previous year and the applicant otherwise meets the conditions of eligibility prescribed under this subtitle. Such loans shall be made available based upon 80 per centum, or such greater per centum as the Secretary may determine, of the total calculated actual production loss sustained by the applicant.

(Pub. L. 87-128, title III, § 329, as added Pub. L. 94-68, § 7, Aug. 5, 1975, 89 Stat. 382, and amended Pub. L. 97-35, title I, § 163, Aug. 13, 1981, 95 Stat. 378.)

7 U.S.C. § 1971. Additional emergency loans

Subsequent loans to continue the farming, ranching, or aquaculture operation may be made under this subchapter on an annual basis for not to exceed two additional years; to eligible borrowers, subject to the limits on loans and the rates of interest established under section 1964 of this title.

(Pub. L. 87-128, title III, § 330, as added Pub. L. 94-68, § 8, Aug. 5, 1975, 89 Stat. 382, and amended Pub. L. 96-438, § 3(b)(2), Oct. 13, 1980, 94 Stat. 1875.)

7 U.S.C. § 1981a. Loan moratorium and policy on foreclosures

In addition to any other authority that the Secretary may have to defer principal and interest and forego foreclosure, the Secretary may permit, at the request of the borrower, the deferral of principal and interest on any outstanding loan made, insured, or held by the Secretary under this chapter, or under the provisions of any other law administered by the Farmers Home Administration, and may forego foreclosure of any such loan, for such period as the Secretary deems necessary upon a showing by the borrower that due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making payments of such principal and interest when due without unduly impairing the standard of living of the borrower. The Secretary may permit interest that accrues during the deferral period on any loan deferred under this section to bear no interest during or after such period: *Provided,* That if the security instrument securing such loan is foreclosed such interest as is included in the purchase price at such foreclosure shall become part of the principal and draw interest from the date of foreclosure at the rate prescribed by law.

(Pub. L. 87-128, title III, § 331A, as added Pub. L. 95-334, title I, § 122, Aug. 4, 1978, 92 Stat. 427.)

7 U.S.C. § 1989. Rules and regulations; delegation of powers

The Secretary is authorized to make such rules and regulations, prescribe the terms and conditions for making or insuring loans, security instruments and agreements, except as otherwise specified herein, and make such delegations of authority as he deems necessary to carry out this chapter.

(Pub. L. 87-128, title III, § 339, Aug. 8, 1961, 75 Stat. 318.)

7 U.S.C. § 1991. Definitions

* * * *

(4) the word "insure" as used in this chapter includes guarantee, which means to guarantee the payment of a loan originated, held; and serviced by a private financial agency or other lender approved by the Secretary

* * * *

(Pub. L. 87-128, title III, § 343, as added Pub. L. 87-703, title IV, § 401(5), Sept. 27, 1962, 76 Stat. 632, and amended Pub. L. 89-586, Sept. 19, 1966 80 Stat. 809; Pub. L. 92-419, title I, § 128(a), Aug. 30, 1972, 86 Stat. 666; Pub. L. 95-334, title I, § 124, Aug. 4, 1978, 92 Stat. 428; Pub. L. 96-438, § 2(2), Oct. 13, 1980, 94 Stat. 1872.)

7 U.S.C. § 1994. Maximum amounts for loans authorized; long-term cost projections

(d) Low-income, limited-resource borrowers

(1) . . . .

(2) The Secretary shall provide notification to farm borrowers under this chapter, as soon as practicable after April 10, 1984, and in the normal course of loan making and loan servicing operations, of the provisions of this chapter relating to low-income, limited-resource borrowers and the procedures by which persons may apply for loans under the low-income, limited-resource borrower program.

(As amended Pub. L. 98-258, title VI, § 607, Apr. 10, 1984, 98 Stat. 140.)

7 U.S.C. § 2266. Congressional reaffirmation of policy to foster and encourage family farms; annual report to Congress

(a) Congress reaffirms the historical policy of the United States to foster and encourage the family farm system of

agriculture in this country. Congress believes that the maintenance of the family farm system of agriculture is essential to the social well-being of the Nation and the competitive production of adequate supplies of food and fiber. Congress further believes that any significant expansion of nonfamily owned large-scale corporate farming enterprises will be detrimental to the national welfare. It is neither the policy nor the intent of Congress that agricultural and agriculture-related programs be administered exclusively for family farm operations, but it is the policy and the express intent of Congress that no such program be administered in a manner that will place the family farm operation at an unfair economic disadvantage.

(b). . . .

(Pub. L. 95-113, title I, § 102, Sept. 29, 1977, 91 Stat. 918; Pub. L. 97-98, title XVI, § 1608, Dec. 22, 1981, 95 Stat. 1347.)

28 U.S.C. § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) . . . .

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to

sections 8(g) (1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(As amended Oct. 4, 1976, Pub.L. 94-455, Title XII, § 1204(c)(1), Title XIII, § 1306(b) (7), 90 Stat. 1697, 1719; Nov. 1, 1978, Pub.L. 95-563, § 14(a), 92 Stat. 2398; Apr. 2, 1982, Pub.L. 97-164, Title I, § 129, 96 Stat. 39; Sept. 3, 1982, Pub.L. 97-248, Title IV, § 402(c) (17), 96 Stat. 669.)

28 U.S.C. § 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast guard Exchanges, or Exchange Counsels of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

As amended Nov. 1, 1978, Pub.L. 95-563, § 14(i), 92 Stat. 2391; Oct. 10, 1980, Pub.L. 96-417, Title V, § 509, 94 Stat. 1743; Apr. 2, 1982, Pub.L. 97-164, Title I, § 133(a), 96 Stat. 39.)

REGULATIONS

Following are excerpts from Title 7, Agriculture, Subtitle B, Regulations of the Department of Agriculture, Chapter XVIII, Farmers Home Administration, Department of Agriculture, revised as of January 1, 1984:

7 C.F.R. PART 1910—GENERAL

Subpart A—Receiving and Processing Applications

7 C.F.R. § 1910.1 General.

This subpart prescribes the policies and procedures for receiving and processing Section 502 and 504 Rural Housing (RH), Farm Ownership (FO), Soil and Water (SW), Recreation (RL), Operating (OL), Emergency (EM), Economic Emergency (EE), Rural Rental Housing (RRH), Rural Cooperative Housing (RCH), Rural Housing Site (RHS) and Labor Housing (LH), loan and grant applications except as modified by program Regulations. It also prescribes policies for informing applicants and other interested individuals about the services of the Farmers Home Administration (FmHA).

. . . .

7 C.F.R. § 1910.3 Receiving applications.

Applications for FmHA assistance will ordinarily be filed in the County Office serving the area in which the farm, dwelling, business, or other facility for which financing is being requested is or will be located.

(a) . . . .

(b) Requests by FmHA borrowers or previous borrowers for additional assistance from FmHA will be processed as follows:

(1) Applicants for FO, OL, EM, RH, individual SW, or individual LH loans who have a current Form FmHA 431-

2. "Farm and Home Plan", Form FmHA 431-3, "Household Financial Statement and Budget", or Form FmHA 410-4, and who are presently indebted to FmHA, will be required to complete only the following items of Form FmHA 410-1 or Form FmHA 410-4:

(i) Name.

(ii) Loan purpose.

(iii) Planned income for next 12 months.

(iv) Date and signature of the applicant.

(2) If information about their current status is not available, applicants should fully complete Form FmHA 410-1 or Form FmHA 410-4, as appropriate. Applicants for EM loans with new losses from an authorized disaster must also complete Form FmHA 1945-22.

(c) County Office Assistants ordinarily will be responsible for receiving loan applications and giving a preliminary explanation of services available through FmHA. An explanation of the types of assistance available should be given whenever it is not clear what type of loan or grant will meet the applicant's needs. The employee receiving the application will make sure that it is properly completed, dated, and signed, and will give whatever assistance is necessary. . . .

[43 FR 56643, Dec. 4, 1978, as amended at 44 FR 48161, Aug. 17, 1979; 47 FR 41334, Sept. 20, 1982; 48 FR 4, Jan. 3, 1983; 48 FR 52566, Nov. 21, 1983]

7 C.F.R. § 1910.4 Processing applications.

When obtaining information concerning applicants and evaluating their qualifications, FmHA personnel will be governed by the provisions of ECOA and the established policies for the various types of assistance offered by FmHA. . . .

(a) *Completed applications.* Applications for which all information necessary to determine eligibility has been received, will be processed in the order received except as modified by veteran's preference policies. The County Supervisor will verify the information furnished by the applicant and record and assemble additional information needed to properly evaluate the applicant's qualifications and credit needs. Information may be obtained and verified by:

(1) County Office records.

(2) Form FmHA 410-4.

(3) Credit reports as provided in Subparts B and C of Part 1910 (Subpart C available in any FmHA office).

(4) Personal contacts.

(5) Visits of supervisory personnel to the applicant's residence or business.

(6) Form FmHA 410-8, "Applicant Reference Letter" to informed sources such as creditors, bankers, merchants, employers, and landlords, the information obtained as a result of personal inquiries and observations will be recorded in the running record. the information obtained by correspondence will be attached to the related application. Form FmHA 410-1 or Form FmHA 410-4, as appropriate. . . .

(7) Form FmHA 410-5, "Request for Verification of Employment." This form may be used to verify employment and income.

(b) *Determining eligibility.* The County Committee will be used to determine eligibility of RH applicants who are also applying for a farmer program loan, or who are already indebted for a farmer program loan. The County Supervisor will determine eligibility for all other RH applicants. All farmer program applications are to be submitted to the County Committee for eligibility. The County

Supervisor must obtain and present to the County Committee sufficient information concerning an applicant for the Committee to determine eligibility for the type of assistance requested.

(c) *County Committee actions.* All actions by the Committee regarding applicant eligibility will be taken in Committee meetings attended by at least two Committee members. If the County Committee is unable to reach a decision based on the information available, they may request the County Supervisor to obtain further information or may request a personal interview with the applicant. The County Committee will act on the application after considering all pertinent information. This action will be taken in the absence of the applicant. County Committee members are required to adhere to all applicable provisions of this regulation when determining eligibility of applicants. Applicants may not be interviewed for reasons unrelated to proper eligibility considerations.

(d) *Timeliness.* Written notice of eligibility or rejection will be sent to all applicants within 30 days after receipt of the completed application. A completed application is one for which all information necessary to determine eligibility has been received. If a determination of eligibility cannot be made within 30 days from the date of receipt of the completed application, the applicant will be notified in writing of the circumstances causing the delay, and the approximate time needed to make a decision. The letter will contain the ECOA paragraph set forth in § 1910.6(b)(1) of this subpart.

(e) *Recording action taken.* The County Committee minutes or the running case record (whichever is appropriate) will show what action was taken on each application. The specific reasons for unfavorable decision of eligibility on applications will be shown on the Committee Certifications.

In those cases not involving County Committee action, this information will be recorded in the running case record.

(f). . . .

[43 FR 56643, Dec. 4, 1978, as amended at 44 FR 48161, Aug. 17, 1979; 46 FR 60803, Dec. 14, 1981]

7 C.F.R. § 1910.6 Notification of applicant.

(a) *Favorable decision.* If the decision of eligibility is favorable, the County Supervisor will notify the applicant immediately, and then will proceed promptly to process the loan in accordance with the applicable regulations. Care should be exercised to be sure that the applicant understands that a decision of eligibility does not constitute approval of the loan. In notifying the applicant of a favorable decision of eligibility the County Supervisor will, when practicable, arrange a meeting with the applicant to proceed with developing the loan docket. When the applicant has been determined eligible for assistance and additional information becomes available that indicates the original determination may be in error, the application will be considered taking the new information into account. If, after reconsideration, the applicant is rejected, adverse action has occurred, and proper notification will be sent.

(b) *Unfavorable decision.* (1) The County Supervisor will immediately notify the applicant in writing of the adverse decision whether made by the County Supervisor or the County Committee. A statement will be made giving specific reasons for the denial. In all cases, applicants will be advised of their appeal rights in accordance with Subpart B of Part 1900 of this Chapter. . . .

(2) If the County Committee determines that the applicant is not eligible, Form FmHA 440-2 County Committee Certification or Recommendation will be completed by giving the specific reasons for the rejection in the blank space immediately above the space for the signatures of the

County Committee members. The form will be dated and the County Committee members will sign in the space provided.

7 C.F.R. § 1910.7 Counseling.

(a). . . .

(b) *Farm and Home Plan.* When information on form FmHA 410-1 or the Farm and Home Plan indicates that the applicant has insufficient income to repay the requested loan, pay other debts and provide a reasonable standard of living, alternative plans of farm operation will be considered to attempt to overcome the problem.

(c). . . .

[43 FR 56643, Dec. 4, 1978, as amended at 48 FR 52566, Nov. 21, 1983]

7 C.F.R. Part 1924

Subpart B—Management Assistance to Individual Borrowers and applicants

SOURCE 42 FR 4111, Jan. 24, 1977, unless otherwise noted.

7 C.F.R. § 1924.51 General.

This Subpart sets forth policies for providing management assistance to individual applicants and borrowers. The term "individual" as used in this Subpart also applies to farming partnerships, corporations and cooperatives receiving Farmer Program loans. This Subpart pertains to all insured loan applicants/borrowers who depend on farm income for loan repayment (except for Rural Housing (RH) borrowers who are not also indebted for an active farmer program type loan), including those Farm Ownership (FO), Soil and Water (SW) and/or Operating (OL) loan applicants and borrowers who are afforded the services of a "New

Full-Time Family Farmer and Rancher Development Committee." (See Exhibit A of this Subpart).

[47 FR 590, Jan. 6, 1982]

7 C.F.R. § 1924.55 Management assistance.

Management assistance includes the following:

(a) Credit counseling with applicants and borrowers.

(b) Planning of farm operations with applicants and borrowers.

(c) Record keeping by borrowers.

(d) Borrower supervision, by Farmers Home Administration (FmHA).

(e) Analysis of borrower operations and/or enterprises by the borrower and FmHA.

7 C.F.R. § 1924.57 Planning.

(a) *Purpose.* Provide a basis for:

(1) Attaining specific production and financial management objectives.

(2) Applicant or borrower management decisions.

(3) FmHA credit and management assistance determinations.

(b) *Responsibility of applicant or borrower.* Applicant or borrower will complete the plans required by FmHA. This will require giving thorough consideration to:

(1) Analyzing total resources available and their use.

(2) Adjustments, improvements, practices, and capital requirements needed for a successful operation.

(3) Determining the gross income, expenses, and net income that can reasonably be expected from the operation.

(c) *Responsibility of County Supervisor.* County Supervisor will assist the applicant or borrower in completing the plans required through:

(1) Stressing the need to correlate long-time and annual plans when both are being developed.

(2) Use of key farm management and financial management practices. These will be established for major farm enterprises, and will be updated annually. Key management practices not already established in an operation will be considered and incorporated into the operation when developing long-time and annual plans.

(3) Requiring applicants when developing their long-time and annual plans to fully utilize plans developed, if any, with the assistance of the Soil Conservation Service (SCS), the Extension Service (ES), or other agency or farm management service.

(4) Planning for the appropriate use of income with the applicant. Priorities for the use of income follow:

(i) Family living and farm operating expenses.

(ii) Payment of scheduled debt installments.

(iii) Payment of delinquencies on secured debts, followed by payments on delinquent unsecured debt.

(iv) Proper use of anticipated remaining income to increase cash reserve, or to make necessary capital purchases.

(v) Advance payments on chattel and real estate debts.

(5) Determining the feasibility of the plans. After considering inventory changes, the net income and dash flow should be sufficient to enable the applicant to:

(i) Pay all operating expenses.

(ii) Meet necessary payments on debts.

(iii) Maintain necessary livestock, farm and home equipment, and buildings to the extent that such items have not been provided for in the operating expenses.

(iv) Have a reasonable standard of living.

(d) *Long-time plans (Form FmHA 431-1, "Long-time Farm and Home Plan").* The long-time plan reflects the long-time aims and objectives of families. It will be required of each applicant or borrower engaged in farming who is receiving a loan when the major adjustments or improvements needed will not be completed the first full crop year. The long-time plan, when developed, will be completed before preparing the annual plan, and revised as conditions require.

(e) *Annual plans (Form FmHA 431-2, "Farm and Home Plan").* An annual plan will be required of each applicant or borrower engaged in farming who receives an FmHA loan or funds from other credit sources as a result of FmHA executing either a subordination agreement or a lien wavier. Also, an annual plan for a typical year will be required when installments are deferred for more than one year or when major adjustments are being made to the operation. The annual plan will cover the 12 month period (or crop year) which most accurately reflects the annual production cycle of the operation.

(1) Complete annual plans will be required for those borrowers:

(i) Receiving initial loans.

(ii) Receiving subsequent FmHA loans or funds from other credit sources under FmHA subordination agreements or lien waivers.

(2) Interim plans may be developed for the remainder of the current years operation to supplement an annual plan for the following year in those cases where the annual plan alone would not be sufficient to accurately show the

complete cycle of operation. This plan will show the planned use of income to be received from livestock and crops held for sale, and cash on hand at that time.

(f) *Documentation and revision of plans.* (1) Plans will be documented in sufficient detail to adequately reflect the overall condition of the operation.

(2) Initial and subsequent plans will be revised whenever significant changes in the borrower's operation occur during the year, including change in use of loan funds or loan amount.

(3) Whenever a Farmer Program initial or subsequent loan is to be made, all items of borrower responsibility enumerated on Form FmHA 1924-14, "Farmer Program Borrower Responsibilities," will be discussed and clearly understood by the applicant(s)/borrower(s). Form FmHA 1924-14 will be executed in accordance with the FMI during the preparation or revision of Form FmHA 431-2.

The plan will be marked "Revision" and changes noted by crossing out any original estimates and inserting new estimates immediately above. The borrower will initial and date major revisions to the plan.

[42 FR 4111, Jan. 24, 1977, as amended at 47 FR 21236, May 18, 1982]

7 C.F.R. Part 1945

Subpart D—Emergency Loan Policies, Procedures and Authorizations

SOURCE: 46 FR 28338, May 26, 1981, unless otherwise noted.

§ 1945.151 Introduction.

(a) *Policy.* This subpart prescribes the policies, procedures, and authorizations of the Farmers Home Administration (FmHA) for making Insured Emergency (EM)

Loans to farmers, ranchers, and aquaculture operators (hereinafter referred to as farmers). FmHA's policy is to make loans to any otherwise qualified applicant without regard to race, color, religion, sex, national origin, marital status, age, or physical/mental handicap (provided the applicant can execute a legal contract). These regulations apply to borrowers and FmHA personnel involved in making EM loans.

(b) *Program administration.* The County Supervisor is the local contact person for loan processing and servicing activities.

§ 1945.152 Program objectives.

The objective of EM loans is to provide financial assistance to cover actual losses sustained by eligible farmers, make major adjustments, and provide annual production credit so that they can maintain sound farming operations after they have sustained substantial losses as a result of an authorized disaster. EM loans are made to assist eligible disaster victims in sustaining and rehabilitating their normal operations. This objective will be accomplished through the extension of credit and such supervisory assistance as is determined necessary to achieve the objectives of the loan and protect the Government's interest. Supervisory assistance will be given in accordance with the provisions of Subpart B of Part 1924 of this chapter.

7 C.F.R. § 1945.154 Definitions and abbreviations.

(a) Definitions.

* * *

(6) *Consolidate.* To combine and reschedule the rates and terms of two or more EM loans made for operating

purposes. This also may include a new EM loan made for operating purposes.

* * *

(9) *Deferment.* To postpone the payment of interest in part and/or principal in whole or in part.

* * *

(19) *Insured loan.* An EM loan made directly by FmHA as lender from the Agricultural Credit Insurance Fund, and serviced by FmHA personnel.

* * *

(31) *Reamortize.* To rearrange the payments of an EM loan made for real estate purposes within either the remaining years of the original repayment period, or, when the repayment period has been extended to the maximum statutory repayment limit, within those years.

(32) *Reschedule.* To rewrite the rates and/or terms of EM loans made for operating purposes.

* * *

(35) *Subsequent loans.* Any EM loans processed by the Finance Office after it processed the first EM loan to a borrower. This includes any subsequent annual production loans. The disaster designation number has no effect in determining whether an EM loan is a subsequent loan.

* * *

[44 FR 75105, Dec. 19, 1979, as amended at 48 FR 10294, Mar. 11, 1983; 48 FR 57106, Dec. 28, 1983]

§ 1945.161 Receiving and processing applications.

(a) *Applications.* Applications for EM loans will be received and processed as outlined in Subpart A of Part

1910 of this chapter. Form FmHA 410-1 will be used for this purpose.

. . . .

§ 1945.168 Rates and terms.

* * *

(c) *Consolidation, rescheduling, reamortization and deferral*—(1) *General requirements.* When the loan approval official determines that consolidation, rescheduling, reamortization, or deferral will assist in the orderly collection of an EM loan, the loan approval official may take such action. The requirements of this paragraph apply when a new loan is being made. If only existing loans are involved and no new loan is being made, see Subpart A of Part 1951 of this chapter.

(i) When deferring, consolidating or rescheduling EM loans made for operating purposes, the requirements set out in subpart A of Part 1951 of this chapter, § 1951.33(b)(1) through (b)(6) must be met.

(ii) When deferring or reamortizing EM loans made for real estate purposes, the requirements of Subpart A of Part 1951 of this chapter, § 1951.40(b) that apply to EM loans must be met.

(2) *Consolidation and rescheduled.* EM loans made for operating purposes may be consolidated or rescheduled subject to the conditions set out in Subpart A of Part 1951 of this chapter, § 1951.33 (d)(1) through (d)(5) and (d)(7) that apply to EM loans.

(3) *Reamortization.* Existing EM loans made for real estate purposes may be reamortized when a new EM loan is made subject to the conditions set out in Subpart A of Part 1951 of this chapter, § 1951.40 (b)(1)(i) through (b)(1)(iii) that apply to EM loans.

(4) *Deferral.* Installments on EM loans, including loans which are consolidated, rescheduled or reamortized, may be deferred.

(i) When deferring installments on EM loans made for operating type purposes, the requirements set out in Subpart A of Part 1951 of this chapter, § 1951.33(e)(1) must be met.

(ii) When deferring installments on EM loans made for real estate purposes, the requirements set out in Subpart A of Part 1951 of this chapter, § 1951.40(b)(2) must be met.

(iii) Deferred installments on EM loans made for operating type or real estate purposes should be scheduled and repaid in accordance with Subpart A of Part 1951 of this chapter, § 1951.33 (e)(2)(i) through (e)(2)(iv).

(5) *Terms*—(i) *Consolidation and rescheduling.* All EM loans made for Subtitle B (operating) purposes will be repaid over a period consistent with the borrower's repayment ability, but not in excess of 7 years from the date of the consolidation or rescheduling except in special cases authorized in paragraph (b)(1) of this section, where a longer term is needed. Initial EM loans for operating type purposes may be rescheduled for up to 20 years from the date of the original note.

(ii) *Reamortization.* Existing EM loans made for real estate purposes may be reamoritized in accordance with § 1951.40(c)(1) of Subpart A of Part 1951 of this chapter.

(6) *Interest rates.* The interest rates for consolidated, rescheduled, and reamortized loans are as follows:

(i) For consolidated, reamortized, or rescheduled non-actual loss loans, the current rate specified in Subpart A of Part 1810 of this chapter (FmHA Instruction 440.1, Exhibit B, available in any FmHA office) at the time of consolidation, reamortization or rescheduling will apply.

(ii) For reamortized or rescheduled actual loss loans, the interest rate will not be changed from that in the original note.

(7) *Processing consolidation, rescheduling, and/or deferment.* These functions will be performed in accordance with the FMI to Form FmHA 1940-17, "Promissory Note."

(8) *Disposition of promissory notes.* The original and County Office copy of all notes that are consolidated, rescheduled, reamortized or deferred will be stamped "Consolidated," "Rescheduled," "Reamortized," or "Deferred," as appropriate, by the County Office. The original note will be filed with Form FmHA 452-2, "Reamortization and/or Deferral Agreement," when appropriate, and the copy filed in the borrower's case file. When consolidated, rescheduled, reamortized or deferred notes have been paid in full or otherwise satisfied, the notes will be handled in accordance with the provisions of Subpart A of Part 1951 and of Part 1864 (FmHA Instruction 456.1) of this chapter.

[46 FR 28338, May 26, 1981, as amended at 48 FR 40203, Sept. 6, 1983]

7 C.F.R. § 1945.180 County Committee certification.

The County Committee will review the application and determine whether or not the applicant meets EM loan eligibility requirements.

(a) *Certification.* If the County Committee finds the applicant eligible, it will prepare From FmHA 440-2, "County Committee Certification or Recommendation." This form will be retained in the County Office file. The County Committee will comply with Subpart A of Part 1910 of this chapter.

(b) *Rejection.* If the County Committee rejects the application, the County Supervisor will inform the applicant in writing of the reasons for rejection. Reasons for unfavorable action will be given in the space provided on Form FmHA 440-2 above the space for signatures. The County Committee will comply with Subpart A of Part 1910 of this chapter. Also, the County Supervisor will complete Part III of all Forms FmHA 1945-29 to show

the rejection of the application, sign, date and forward to the appropriate ASCS county office in accordance with the FMI.

7 C.F.R. PART 1951—SERVICING AND COLLECTIONS

Subpart A—Account Servicing Policies

AUTHORITY: 7 U.S.C. 1989: delegation of authority by the Sec. of Agri., 7 CFR 2.23; delegation of authority by the Asst. Sec. for Rural Development, 7 CFR 2.70.

SOURCE: 44 FR 46251, Aug. 7, 1979, unless otherwise noted.

7 C.F.R. § 1951.1 Purpose.

This subpart sets forth the policies and procedures to use in servicing borrower's accounts.

7 C.F.R. § 1951.2 Policy.

Borrowers are expected to pay their debts to the Farmers Home Administration (FmHA) in accordance with their agreements and ability to pay. They will be encouraged to pay ahead of schedule, consistent with sound financial management. When borrowers have acted in good faith and have exercised due diligence in an effort to pay their indebtedness but cannot pay on schedule because of circumstances beyond their control, servicing actions will be consistent with the best interests of the borrower and the Government. It is policy of this agency to service borrower loan accounts without regard to race, color, religion, sex, marital status, national origin, age, physical or mental handicap (borrower must possess the capacity to enter into a legal contract for services).

7 C.F.R. § 1951.3 Authorities and responsibilities.

County Supervisors are responsible for servicing all FmHA accounts serviced by the County Office as prescribed by this subpart under the general guidance and supervision of District Directors and State Office person-

nel. Full use will be made of the County Office Management System in account servicing.

7 C.F.R. § 1951.33 Deferral, consolidation and rescheduling of OL, and EM and EE loans made for Subtitle B purposes.

All borrowers are expected to repay their loans according to planned repayment schedules. However, circumstances may occur which will not permit borrowers to pay as scheduled or to refinance the loans. This section explains how to consolidate, reschedule, and defer installments on *existing* loans providing the borrower agrees to such actions.

(a) *Definitions:* (1) Subtitle B purposes are the loan purposes stated in § 1941.16 of Subpart A of Part 1941 of this chapter.

(2) Reschedule means to rewrite the rates and/or terms of OL, EM or EE loans made for Subtitle B purposes.

(3) Consolidate means to combine and reschedule the rates and terms of two or more OL, EM or EE loans made for Subtitle B purposes for other than actual losses.

(4) Defer means to postpone the payment of part of a loan installment.

(b) *General requirements.* County Supervisors are authorized to approve, consolidate, reschedule and defer loans. When the County Supervisor determines that consolidation, rescheduling and deferral will assist in the orderly collection of the loan, the County Supervisor should take such action, provided:

(1) Such action is not used in lieu of or to delay liquidation:

(2) Such action is not taken to only remove a delinquency:

(3) Such action is not taken to circumvent FmHA's graduation requirements:

(4) The borrower's account is not being serviced by OGC or the U.S. Attorney, and there are no plans to have the account serviced by either of these offices in the near future:

(5) The County Supervisor determines that the borrower is making satisfactory progress or will make satisfactory progress with revised repayment terms; and

(6) The borrower is cooperating in servicing the account and is maintaining the security.

(c) *Consolidation and rescheduling OL loans.* (1) An OL loan secured by real estate will not be consolidated or rescheduled, unless the County Supervisor reviews the Government's real estate lien priority and value of security and determines such an action will be in the best interest of the Government and the borrower.

(2) OL loans will be consolidated only with other OL loans.

(3) The amount of outstanding accrued interest at the time of consolidation or rescheduling will be added to principal.

(4) Consolidated and rescheduled loans will be repaid according to the borrower's repayment ability, but never in excess of seven years from the date of consolidation or rescheduling.

(5) The interest rate for consolidated or rescheduled loans will be the current interest rate for OL loans made to regular or limited resource loan borrowers, as appropriate. Limited resource loan interest rates will be stated in increments of whole numbers and may be increased to the current OL rate or decreased to not less than the current limited resource interest rate set out in Exhibit B of FmHA Instruction 440.1 (available from any FmHA office), in accordance with a borrower's repayment ability.

(d) *Consolidated and rescheduling EE and EM loans.* EE and EM loans made for real estate purposes will *not* be consolidated and rescheduled under any circumstances. EE and EM loans made for operating purposes may be consolidated and rescheduled subject to all of the following conditions:

(1) EE and EM loans may be consolidated and rescheduled when it is in the best interests of the borrower and the government.

(2) EM actual loss loans will *not* be consolidated.

(3) EM annual operating loans can be consolidated only with other EM annual operating loans.

(4) EM major adjustment loans for operating purposes can be consolidated only with other EM major adjustment loans for operating purposes.

(5) EE and EM loans which were made without a consolidation and rescheduling action and which have repayment terms greater than seven (7) will *not* be consolidated.

(6) EE loans made for operating purposes can be consolidated only with other EE loans made for operating purposes.

(7) Before a consolidation occurs and a new note is taken, the County Supervisor must review the government's lien priority and see if any new liens have been filed on the security for the loan. If there are any liens which were not in existence at the time the first note was signed, the County Supervisor should ask OGC for an opinion as to what lien position the government will have if the consolidation occurs and a new note is taken. Then the County Supervisor must determine that the government's interests will be protected adequately if the consolidation occurs.

(8) Repayment terms for consolidated and rescheduled EE or EM loans will be:

(i) Seven (7) years or less from the date of the consolidation or rescheduling, but consistent with the borrower's repayment ability.

(ii) Equal to or greater than the longest repayment terms established on the existing EE or EM loans being consolidated. For example, if a borrower's existing loan is due in five (5) years, the consolidated loan must be due in at least (5) years.

(9) Repayment terms for EE and EM loans which are rescheduled without an accompanying consolidation action will not exceed twenty (20) years from the date of the original note.

(10) The interest rate for consolidated or reschedule loans:

(i) For EE loans, will be the current loan rate in effect as specified in Subpart A of Part 1810 of this chapter (FmHA Instruction 440.1, Exhibit B available in any FmHA office) at the time of consolidation or rescheduling.

(ii) For EM actual loss loans, will *not* be changed from the rate in the original note.

(iii) For EM annual operating loans or EM major adjustment loans for Subtitle B (operating) purposes, will be the current rate specified in Subpart A of Part 1810 of this chapter (FmHA Instruction 440.1 Exhibit B available in any FmHA office) at the time of consolidation and rescheduling.

(e) *Deferral of OL, EM, and EE loans made for Subtitle B purposes.* Installments on loans, including loans that are consolidated or rescheduled, may be deferred. The use of deferral authority will generally involve beginning farmers, applicants with limited income and resources, and applicants who have had production and economic losses because of natural or economic conditions.

(1) Deferred payments may be authorized if the following conditions exist: (i) A Form FmHA 431-2 "Farm and Home Plan" and, if appropriate, Form FmHA 431-4, "Business Analysis-Nonagricultural Enterprise," shows loan installments cannot be repaid according to schedule.

(ii) A typical Farm and Home Plan and, if appropriate, a Business Analysis-Nonagricultural Enterprise for a full crop year (calendar year for EM) following the deferral period indicates that full installments can be paid if normal conditions exist.

(iii) If appropriate, a Form FmHA 431-1, "Long-time Farm and a Home Plan," is prepared.

(iv) If appropriate, development and improvements have been provided for on Form FmHA 424-1, "Development Plan."

(2) Scheduling and repaying deferred installments. (i) Up to three installments may be deferred, but in no case will the deferral extend beyond the final due date of the note. Partial payments of accrued interest will be scheduled annually during the deferral period on Form FmHA 1940-17, "Promissory Note." Full payments will be scheduled at the earliest date the Farm and Home Plan indicates they can be repaid.

(ii) Borrowers will be advised that they are expected to make payments as soon as they have repayment ability, even though the deferral period has not expired.

(iii) Deferred interest will not be capitalized.

(iv) Installments of principal and interest to be paid after the deferral period will be calculated in accordance with the FMI for Form FmHA 1940-17.

(f) *Processing,* (1) Form FmHA 1940-17 will be prepared for notes or assumption agreements being consolidated or rescheduled in accordance with the provisions of the FMI. If the County Office does not have possession of the orig-

inal note or assumption agreement, the County Supervisor will ask the Finance Office to return the original form so it is in the County Office *before* Form FmHA 1940-17 is processed. Form FmHA 1951-4, "Change in Rates and Terms," will be completed and sent to the Finance Office in accordance with the provisions of the FMI.

(2) The original and County Office copy of all notes or assumption agreements that are consolidated or rescheduled, will be stamped "Consolidated", or "Rescheduled", as appropriate, by the County Office. The original instruments being consolidated or rescheduled will be filed with the borrower's new consolidated or rescheduled note and a copy filed in the borrower's case file. When the consolidated or rescheduled note has been paid in full or otherwise satisfied, it and all other instruments will be handled in accordance with the provisions of § 1951.15 of this subpart.

[44 FR 46251, Aug. 7, 1979, as amended at 44 FR 75132, Dec. 19, 1970; 45 FR 58815, Sept. 5, 1980]

7 C.F.R. § 1951.40 Deferment and reamortization of FO, SW, RL, EE or EM loans made for real estate purposes.

All borrowers are expected to repay their loans according to planned repayment schedules. However, circumstances may occur which will not permit borrowers to pay as scheduled or to refinance loans. This section explains how the County Supervisor can reamortize and defer installments on existing loans. County Supervisors are authorized to approve deferments and reamortization of loans under this section including assumption agreements.

(a) *Definitions:* (1) Reamortization means to rearrange the installments of a loan which may include changing the interest rate and terms of the loan.

(2) Defer means to postpone the payment of part of a loan installment.

(b) *Requirements.* These servicing actions will not be taken if a borrower's account(s) is being serviced or is planned to be serviced in the near future by the OGC or the U.S. Attorney. Also, these servicing actions will not be used for the purpose of avoiding FmHA graduation requirements.

(1) Loans should be reamortized, subject to the following conditions: (i) FO, SW, RL, EE, and EM loans should be reamortized when it will be in the best interest of the borrower and the Government.

(ii) A loan will not be reamortized only to remove a delinquency.

(iii) A delinquent account will not ordinarily be reamortized if it appears the borrower can pay the account current within two years.

(iv) At the time of reamortization an FO loan may be changed to a limited resource interest rate if the borrower meets the requirements for a limited resource interest rate.

(2) Installments on existing FO, SW, RL, EM and EE loans should be deferred subject to the following conditions: (i) The deferment is necessary to enable the borrower to remain on the farm.

(ii) The borrower shows that due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making payments of principal and interest due on the loan without unduly impairing the borrower's standard of living.

(iii) The borrower is cooperating in servicing the account and maintaining the security.

(iv) Payments are not being deferred just to remove a delinquency or delay liquidation.

(v) A Farm and Home Plan and Business Analysis—Nonagricultural Enterprise, when appropriate, shows that

the reamortized installments or the full installments at the end of the deferred period can be paid.

(c) *Terms.* (1) Reamortized installments usually will be scheduled for repayment within the remaining period of the note or assumption agreement being reamortized. If any repayment is extended, the new repayment period may not exceed 40 years from the date of the original note or assumption agreement or the useful life of the security, whichever is less.

(i) The FmHA's lien priority may be affected if the final due date of the original loan is changed. A State supplement will be issued to provide instructions on the effect a change in due date has on security instruments and the action necessary to retain the Government's lien priority. The State supplement will also include instructions in releasing the original security instrument when a new one is obtained.

(ii) The amount of interest accrued at the time of reamortization will be added to the principal unless a deferment is involved. If there are no deferred installments, the first installments under the reamortization will be at least equal to the interest which will accrue on the new principal between the date of Form FmHA 1940-17 and the next January 1.

(2) Generally, only one installment will be deferred at a time. However, more than one installment, but not more than three, should be deferred if it is determined that such action is necessary to enable the borrower to remain on the farm.

(i) The deferred period cannot be later than the final due date on the promissory note or assumption agreement unless the final due date is changed by reamortization as provided in paragraph (c)(1) of this section.

(ii) Whole installments will not be deferred. Some payment will be scheduled on each installment due date.

(iii) When a deferment is necessary the loan will be reamortized and the installments scheduled in accordance with the borrower's repayment ability.

(iv) Borrowers will be encouraged to make additional payments during the deferral period if they are able to do so.

(d) *Interest.* (1) The interest rate for other than limited resource loans will be the current interest rate in effect at the time the reamortization is granted except for EM actual loss loans in which case the interest rate will not be changed.

(2) If a limited resource loan is reamortized within the first three years the interest rate will be the same rate at which the loan was initially made. After the first three years a limited resource loan may be reamortized at the interest rate in effect at that time for that loan or at a higher rate in accordance with the borrower's repayment ability. If the interest rate is to be increased it may be done in increments of whole numbers to the current rate for nonlimited resource borrowers.

(3) The amount of all accrued interest through the date the reamortization is granted will be added to the principal. When it is necessary to defer part of the interest, the amount deferred will be limited to that amount shown in the Farm and Home Plan to be necessary to enable the applicant to regain repayment ability. Interest accrued during the deferral period will not be added to the principal. Installments after the deferral period will be scheduled for payment in accordance with the FMI for Form FmHA 1940-17.

(e) *Processing.* A separate Form FmHA 1940-17 will be used for each note or assumption agreement being reamortized or deferred.

(1) Form FmHA 1940-17 may be processed provided the County Office has possession of the original note or as-

sumption agreement being reamortized or deferred. If the County Office does not have possession of the original note or assumption agreement, the County Supervisor will ask the Finance Office to return the original form so it is in the County Office *before* Form FmHA 1940-17 is processed.

(2) Form FmHA 1940-17 will be completed, signed, and distributed as provided in the FMI.

(3) Form FmHA 1951-4 will be completed and sent to the Finance Office to inform it of the new terms.

(4) The original and County Office copy of notes or assumption agreements that are reamortized or on which payments are deferred will be marked "REAMORTIZED, (*date*)" OR "DEFERRED, (*date*)", as appropriate. The original of Form FmHA 1940-17 will be attached to the original of the note or assumption agreement being reamortized or deferred and filed in the promissory note folder. A copy of each will be filed in the borrower's case file.

(5) There is no limit on the number of times a Form FmHA 1940-17 can be processed providing the requirements for reamortization are met each time this form is processed. No more than 3 installments may be deferred at one time.

[44 FR 46251, Aug. 7, 1979, as amended at 44 FR 756132, Dec. 19, 1979]

7 C.F.R. PART 1962—PERSONAL PROPERTY

Subpart A—Servicing and Liquidation of Chattel Security

7 U.S.C. § 1962.17 Releasing chattel security.

Chattel security maybe released only when release will not be to the financial detriment of FmHA. Borrowers will

be strictly accountable to FmHA for the proper use of proceeds from the sale of security. Insurance proceeds derived from the loss of security will be treated the same as sale proceeds. The authority to release security for FmHA loans is different for basic security than for normal income security.

(a) *Basic security.* Basic security is all equipment (including fixtures in UCC States) and foundation herds and flocks securing FmHA loans which serve as a basis for the farming or other operation outlined in Form FmHA 431-2, "Farm and Home Plan," Form FmHA 431-3, "Household Financial Statement and Budget," or Form FmHA 431-4, "Business Analysis Nonagricultural Enterprise," and replacement of such property. It also includes animals sold as a result of the normal culling process, unless the borrower has replacements that will keep numbers and production up to planned levels and animals or birds sold when a borrower plans to significantly reduce the basic livestock herd or flocks. County Supervisors may release basic security when the property has been sold or exchanged for its present market value and the value of the borrower's remaining FmHA security, as determined by an appraisal, is substantially greater than the amount of the debt or when the property has been sold or exchanged and the proceeds are used for one or more of the following purposes:

(1) To apply to the debts owed to FmHA which are secured by liens on the property sold.

(2) To purchase from the proceeds of the sale, or to acquire through exchange, property more suitable to the borrower's needs. The new property, together with any proceeds applied to the indebtness, will have security value to FmHA at least equal to that of the lien formerly held by FmHA on the old property and subject to the following:

(i) *UCC cases.* Under the after-acquired property provisions of the security agreement, the new property, ex-

cept fixtures, will be subject to the security interest of FmHA provided the financing statement on file and the security agreement cover the class of property. Therefore, new security instruments will not be needed.

(A) However, if either the financing statement or security agreement does not cover such property, a new instrument will be taken.

(B) Since the after-acquired property clause in the security agreement does not cover fixtures, a new security agreement would have to be taken for them. A new financing statement also will have to be taken and filed unless the existing filed financing statement covers fixtures by class and describes the land on which the new fixtures are or are not to be located.

(ii) *Chattel mortgage cases.* The new property is made subject to a lien in favor of FmHA by the execution of a new security instrument (or by operation of the "replacement" or "after-acquired property" clauses in lien instruments in accordance with State supplements).

(iii) *Time of taking new security instruments.* New security instruments are taken at the time of the acquisition of the new property referred to in paragraphs (a) (2) (i) and (ii) of this section. In individual cases, however, County Supervisors may delay as long as 1 year or until new instruments are necessary for other reasons, whichever is earlier, when adequate security will continue to exist. Security is considered adequate if its value, as determined by a chattel appraisal of the borrower's chattel appraisal of the borrower's chattel property remaining under lien to FmHA, is substantially greater than the amount of the debt.

(3) To make payments to other creditors having liens on the property sold which are superior to the liens of FmHA. However, any amount remaining after payments

to the other creditors will be used in accordance with paragraphs (a) (1) and (2) of this section.

(4) To pay costs to preserve the security because of an emergency or catastrophe, when the need for funds cannot be met through an FmHA loan, or an FmHA loan cannot be made in time to prevent the borrower or FmHA from suffering a substantial loss.

(b) *Normal income security.* This is all security not considered basic security including crops, livestock, poultry, products, and other property covered by FmHA liens which are sold in operating the farm or other business. County Supervisors may release normal income security when the property has been sold or exchanged for its present market value and the proceeds are used for one or more of the following purposes:

(1) To pay debts owed to FmHA.

(2) To pay farm and home or other operating expenses provided for in tables of Form FmHA 431-2, Form FmHA 431-3, or Form FmHA 431-4.

(3) To pay necessary farm and home or other operating expenses shown as debts in the financial statement on Form FmHA 431-2 or Form FmHA 431-3 and to be paid during the year as shown by the debt payment table, provided these debts were incurred in the production, harvesting, or marketing of crops, livestock, poultry or products sold during the year or were for family subsistence for that year.

(4) To pay an amount not more than the equivalent of 1 year's income taxes and social security taxes.

(5) To make payments to other creditors having liens on the property sold which are superior to FmHA liens.

(6) To pay annual installments on debts owed on essential real estate to creditors other than FmHA. These amounts must be reasonable when related to the normal

rental charge for similar real estate in the area, and there should be assurance that the borrower will keep the real estate at least for the next year.

(7) To make reasonable payments on debts owed to other creditors for essential home equipment and passenger automobiles provided for in the debt payment tables of Form FmHA 431-2 or Form FmHA 341-3 or approved revisions. Such debts ordinarily will be considered for payment only after the full amount agreed on for the year has been paid to FmHA. However, reasonable amounts may be paid to other creditors when due would result in the borrower's losing possession of essential home equipment or passenger automobile, and the loss would require the borrower to replace the property or to go to substantial additional expense to continue the operation.

(8) To make payments on debts on harvesting equipment such as cotton picker corn pickers, combines, forage harvesters, and so forth in addition to paying essential harvesting expenses provided an OL or EM loan for the crop year did not include funds for the payment of depreciation on such equipment, and the total amount released for such payments and harvesting costs, plus any loan funds advanced for harvesting costs, is not more than the amount that would be required during the crop year on a custom basis to harvest the crops using the harvesting equipment.

(9) To make payments on debts owed to other creditors and to make purchases or to meet expenses not otherwise covered in this section provided:

(i) Debt payments, purchases, or expenses are included in Form FmHA 431-2, Form FmHA 431-3, or Form FmHA 431-4:

(ii) Sufficient income will be available to pay an amount equivalent to that scheduled on the notes to fall due during the year, plus the amount agreed on for any delinquencies, on FmHA debts secured by liens on chattel property; and

(iii) Debt payments, purchases, or expenses are essential for the borrower to obtain or keep necessary equipment or to continue a sound operation.

(10) To pay costs required to preserve the security because of an emergency or catastrophe, when the need for funds cannot be met through an FmHA loan or an FmHA loan cannot be made in time to prevent the borrower or FmHA from suffering a substantial loss.

(11) To permit crops serving as security for FmHA loans to be fed to livestock when the County Supervisor determines that this disposal is preferable to direct marketing of the crops, provided a lien or assignment is obtained on the livestock or livestock products.

(12) When livestock is consumed by the borrower's family for subsistance.

(c) *Distribution of income from normal income security.* On finding that the amount of income originally planned for the year will not be received, the County Supervisor will determine, in consultation with the borrower, how to use income that is available or will become available during the remainder of the planned year as shown on Forms FmHA 431-2 or FmHA 431-4. If other creditors have liens on the property from which the normal income is received, they also must be consulted. Priorities in distributing the income that will be available are as follows:

(1) Pay necessary farm, home, and other expenses planned for payment by cash as incurred.

(2) Prorate repayments on credit advanced for necessary farm, home, and other operating expenses to FmHA and other creditors.

(3) Make planned payments on other debts as shown in Table K of Form FmHA 431-2 or Part I of Form FmHA 431-3. However, minimum payments may be made on such debts along with the payment of cash farm, home, and

other operating expenses on credit advanced for such purposes when necessary to enable the borrower to keep essential property.

(d) *Plans as basis for releasing chattel security.* Release of both basic and normal income security will be based on information about the borrower's operations as shown on Form FmHA 431-2, Form FmHA 431-3, or Form FmHA 431-4, as appropriate.

(1) If plans have been developed for the borrower's current crop or business year, the release will be based on them.

(2) If no recent plans have been made with the borrower, the release will be based on the County Supervisor's knowledge of the borrower's current operations, plus inquiry and documentation of the facts about the borrower's present operation in the running case record.

* * *

(7 U.S.C. 1989; 5 U.S.C. 301, Sec. 10, Pub. L 93-357, 88 Stat. 392; delegation of authority by the Secretary of Agriculture, 7 CFR 2.23; delegation of authority by the Assistant Secretary for Rural Development, 7 CFR 2.70)

[44 FR 4437, Jan. 22, 1979, as amended at 44 FR 64795, Nov. 8, 1979; 48 FR 52566, Nov. 21, 1983]

IN THE

Supreme Court of the United States

OCTOBER TERM,

No. A88-79

HOWARD SMITHSON, *et al.*,

Applicant

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including August 23, 1988.

/s/ WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES OFFICE OF THE CLERK WASHINGTON, D.C. 20543

NOTIFICATION LIST

Mr. Steve Alexander
31 East Center Street
P.O. Box 1152
Fayetteville, AR 72702

Mr. Charles Fried
Solicitor General
United States Dept. of Justice
Washington, DC 20530

Francis X. Gindhart
United States Court of Appeals for
the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-326

In the Supreme Court of the United States

OCTOBER TERM, 1988

HOWARD AND MARETTA SMITHSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
DAVID M. COHEN
ROBERT S. GREENSPAN
ROBERT D. KAMENSHINE
TERRENCE S. HARTMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioners have a claim for breach of contract because the Farmers Home Administration (FmHA) on one occasion took almost 90 days to comply with a contractual provision that states, without any provision as to time limits or schedules for making loans, that FmHA will "make future" loans if funds are available and the applicants meet all regulations.

2. Whether an FmHA security agreement provision stating that the agreement "is subject to [the agency's] present regulations * * * and to its future regulations not inconsistent with [the agreement's terms]" makes the FmHA's entire body of rules enforceable against the agency in an action for damages for breach of contract.

3. Whether there were genuine disputes of material fact that precluded summary judgment against petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-326

HOWARD AND MARETTA SMITHSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is reported at 847 F.2d 718. The opinion of the United States Claims Court (Pet. App. 11a-32a) is reported at 12 Cl. Ct. 345.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on May 11, 1988. On July 29, 1988, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including August 23, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves an alleged breach of contract by the Farmers Home Administration (FmHA). Between 1972 and 1983, FmHA made 15 emergency or farm ownership loans to petitioners (Pet. App. 15a). Under the Consolidated Farm and Rural Development Act, when a farmer "is unable to obtain sufficient credit elsewhere to finance his actual needs at reasonable rates and terms," the Farmers Home Administration is authorized to make loans for, among other purposes, operating family farms. 7 U.S.C. 1941-1947; see *Dahl* v. *United States*, 695 F.2d 1373, 1378-1379 (Fed. Cir. 1982).

To ensure repayment, FmHA required petitioners to execute five security agreements, which were standard FmHA forms containing the following clauses (Pet. App. 14a-15a):

> E. This Agreement is subject to the present regulations of the Secured Party and to its future regulations not inconsistent with the express provisions hereof.
>
> * * * * *
>
> J. Secured Party will make or insure future loan advances to Debtor to enable him to raise or harvest farm crops or raise livestock or other animals, provided funds are available and the Debtor meets all the current requirements imposed by regulations of the Secured Party.

On January 10, 1984, petitioners applied for a sixteenth FmHA loan (Pet. App. 15a). Approximately three weeks later, on February 2, 1984, after FmHA's county supervisor had worked with them to develop an annual financial and operating plan, known as a Farm and Home Plan (see 7 C.F.R. 1924.57(e) and (f)), the supervisor submitted

petitioners' application and plan to FmHA's state office (Pet. App. 15a). Petitioners allege that the Farm and Home Plan as submitted was inaccurate.

On February 15, 1984, less than two weeks after the county supervisor made that submission, the state office responded by setting conditions for petitioners' continued receipt of loans (Pet. App. 15a). Based on a new Farm and Home Plan, however, the county committee certified that petitioners had the necessary character and farming ability to qualify for a loan (see 7 C.F.R. 1941.12(a)(5), 1941.30, 1945.162(g)). Approximately three weeks later, the county supervisor forwarded the county committee's certification of eligibility for petitioners to the state office, along with a revised Farm and Home Plan (Pet. App. 15a). Within approximately four weeks of receipt of that information, on April 6, 1984, the state office advised the county supervisor that petitioners' loan application had been approved (*ibid.*). Five days earlier, however, petitioners had surrendered a tract of leased land that they had told FmHA they intended to farm in 1984, and they therefore declined to accept the loan (*ibid.*).

Two weeks after declining to accept the FmHA loan, petitioners requested that they be furnished loan-servicing relief for their existing loans (Pet. App. 15a-16a).[1] FmHA denied that request within four weeks of its receipt (*id.* at 16a).

2. Petitioners brought a breach-of-contract suit in the United States Claims Court seeking more than two million dollars for loss of their farming operation and damage to

---

[1] When a farmer receives a loan from FmHA, he is expected to repay that loan according to a planned repayment schedule. When appropriate, however, an FmHA county supervisor may rewrite rates or terms for loans (reschedule loans), combine and rewrite the rates and terms of two or more loans (consolidate loans), or postpone payment of part of a loan installment (defer loans). 7 C.F.R. 1951.33 (1987).

their reputation based on FmHA's "delay" in granting their loan application and "failure" to consider them for loan-servicing relief (Pet. App. 16a, 27a). They asserted that FmHA's county supervisor used "false and misleading numbers" in completing their Farm and Home Plan "for the sole purpose of wrongfully denying [their] application," thereby delaying FmHA's approval (*id.* at 15a; Pet. 4, 7). Petitioners further claimed that the supervisor later neglected to consider them for loan-servicing relief (Pet. 7).

The Claims Court granted the government's motion for summary judgment (Pet. App. 32a). The court held that, to recover money damages against the United States, a litigant must point either to a provision of law that fairly mandates the payment of money sought or to a breach of a contractual obligation. Petitioners had pointed to neither (*id.* at 17a-18a). The court explained that they had made "no claim that any of the statutes relied upon is money-mandating" and had cited no contractual provision requiring that FmHA "timely" process their loan application or consider them for loan-servicing relief (*id.* at 21a, 26a, 28a).

The court further observed that petitioners misplaced their reliance on clauses E and J of their security agreements as the source of contractual duties. The court stated that, since clause J contained no express requirement or guarantee that FmHA would approve a loan within a specified period, FmHA fully adhered to that clause when it approved a loan for petitioners (Pet. App. 28a). The court added that, although clause E provided that the parties' security agreement would be subject to present and consistent future FmHA regulations, it was unreasonable for petitioners to infer from the language of this clause that "FmHA meant to obligate itself in wholesale fashion to comply with each FmHA regulation or risk breach of

contract damages" under its standard form security agreement (*id.* at 26a).

3. In an opinion by Judge Davis, the court of appeals affirmed (Pet. App. 1a-9a). As a threshold matter, the court observed that the Claims Court had "initial jurisdiction" over the case "because [petitioners] sued for breach of their contracts with FmHA," but that jurisdiction over petitioners' specific contentions must be "judged separately" (*id.* at 6a). The court further observed that, in examining those contentions, it could not, in the absence of record support, assume, as did petitioners, that FmHA officials had acted arbitrarily or in bad faith (*ibid.*; *id.* at 9a n.4). The court then addressed petitioners' claim that FmHA had breached its contract, either by violating its regulations, which petitioners contended were incorporated by clause E of their security agreement, or by unduly delaying the tender of requsted loan funds and other services that petitioners asserted were required by clause J (*id.* at 7a-9a). The court concluded that no breach of contract had occurred (*ibid.*).

The court held that clause E of the security agreement, which provided that the agreement would be "subject to" present and consistent future FmHA regulations, did not incorporate wholesale into the parties' contracts the mass of FmHA regulations (Pet. App. 7a). The court reasoned that, if the parties had wished to incorporate fully into their contracts all FmHA regulations, "they would have explicitly so provided" and that a "wholly new ground of obligation" should not be created on the part of the government by implication from clause E, which appears to say no more than that a "contract provision * * * contrary to a regulation would be invalid" (*ibid.*). The court noted that "the more natural reading of appellants' complaint is that its incorporation argument states, not a true

contractual claim, but a tort claim * * * for misfeasance and misconduct" (*id.* at 7a-8a).

The court also reasoned that clause J, which provided for "future loans and advances" to a borrower under specified conditions, "did not set any time limits or schedules" for such loans; nor did it cover servicing relief (Pet. App. 9a). Therefore, any undue FmHA delay in making the loan or failure to provide alternative relief was "vindicable, if at all, only in a tort action of which the Claims Court would have no jurisdiction" (*ibid.*). Finally, the court noted that, based on the record, it did not consider the less than 90 days FmHA took to approve petitioners' application to be an undue delay or an abuse of discretion (*ibid.*).

Chief Judge Markey concurred. He would have dismissed the appeal on the ground that petitioners' claims sound in tort and therefore are beyond the jurisdiction of the Claims Court and the Federal Circuit. Pet. App. 10a.

ARGUMENT

Since petitioners' application for a loan was approved by FmHA, they advance no claim that they were denied a loan. Instead, they make several arguments in support of the contention that they should be allowed to pursue an action in the Claims Court against the United States for FmHA's alleged failure to process their loan in a timely fashion. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any court of appeals. Thus, no further review is warranted.

1. Petitioners contend (Pet. 9-17) that the courts below erred in holding that petitioners have no valid breach-of-contract claim (but at most only a tort claim that is beyond the jurisdiction of the Claims Court) for

FmHA's allegedly "undue" delay in processing their loan application. Petitioners contend that that holding is in conflict with the decisions of other courts of appeals. There is, however, no conflict.

In *Petersburg Borough* v. *United States,* 839 F.2d 161 (3d Cir. 1988), the court did suggest that an action for undue delay in furnishing a loan could be pursued as a breach-of-contract claim in the Claims Court. The basis for that holding, however, was that "the Borough's claim is for breach of *a promise by [FmHA]* to close timely" (839 F.2d at 163 (emphasis added)). There is no such promise in this case, for FmHA agreed only "to make or insure loan advances to [petitioners]" on certain conditions, without specifying any schedule for the making of such loans. Moreover, the *Petersburg* court was careful not to "imply that the Borough is or is not entitled to recover in [the Claims Court]" (*ibid.*).

United States v. *Huff,* 165 F.2d 720 (5th Cir. 1948), likewise does not conflict with the decision below. The case did not involve a promise to make loans at all, but rather a promise (in connection with the operation of an Army training camp on land farmed by the plaintiffs) that, "following the crossing of [specified] fences by the troops, the Government will restaple the said wire to the posts, and leave the fence in as good condition and repair as it was at the time of entry upon the leased premises by the Government" (165 F.2d at 723).

The court, quite understandably in light of the nature of the contract, construed the phrase "following the crossing of the fences by the troops" to "inject[ ]" a "time element" (165 F.2d 724) "even though no such word as 'immediately' precedes the phrase" (*id.* at 725). The government was held to have breached the contract because "the Government did virtually no repairing of the fences at *any* of the times in question" (*ibid.* (emphasis added)). The Fifth Circuit's

holding that the government breached that particular contract hardly implies that petitioners have a tenable claim for breach of the very different kind of contract involved in this case, which contains only a generalized promise to make loans if petitioners prove to be eligible, and neither specifies any time at which loans will be made nor by its nature suggests that the government intended to bind itself to make each and every such loan at a time that would fit petitioners' needs.

Petitioners' contention that the court below departed from principles recognized by this Court in *Hatzlachh Supply Co.* v. *United States,* 444 U.S. 460 (1980), and *Keifer & Keifer* v. *Reconstruction Finance Co.,* 306 U.S. 381 (1939), is also incorrect. Those cases stand only for the unexceptional proposition that a valid contract claim is not outside the jurisdiction of the Claims Court merely because it has elements of tort as well as contract. The decision below does not suggest that petitioners' claim fails *because* it might be tortious in nature; rather, the decision below merely suggests (without deciding) that petitioners, who have no valid contract claim, might nevertheless be able to state a valid tort claim.[2]

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[2] It is principally for that reason that there is no merit to petitioners' repeated claims (Pet. 12 n.3, 13 n.4, 17, 20 n.9, 22 n.11) of a conflict between the decision below and other decisions of the Federal Circuit or its predecessor the Court of Claims. Moreover, decisions of the Court of Claims are binding on the Federal Circuit (see *South Corp.* v. *United States,* 690 F.2d 1368, 1370-1371 (Fed. Cir. 1982) (en banc)), and any conflict of the sort petitioners allege would be a matter for the Federal Circuit, not this Court, to resolve. See *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957). We note, in this regard, that petitioners did not seek either rehearing or rehearing en banc in the Federal Circuit. In any event, the decisions that petitioners cite are not remotely in conflict with the decision below, and it is particularly ironic that petitioners apparently claim a conflict between the decision below, written by Judge Davis, and such decisions as *L'Enfant Plaza Properties* v. *United States,* 645 F.2d 886, 892 (Ct. Cl. 1981)

The gist of the decision below is not, as petitioners seem to believe, that all claims of undue delay in contract performance are tort claims that can never be pursued as contract claims in the Claims Court. Rather, it is that the contract at issue in this case simply was not breached by the modest delay that petitioners encountered in obtaining the loan that they sought in early 1984 (see Pet. App. 9a), at least in the absence of any record support for petitioners' claim that the agency acted in bad faith or engaged in misconduct (*id.* at 9a n.4). That holding is supported by the record and presents no issue of widespread importance warranting this Court's review.

2. Petitioners also contend (Pet. 17-24) that the court below erred in holding that the contract at issue in this case did not make every violation of an FmHA regulation into a contractual promise whose breach would give rise to an action for damages. That holding, however, is plainly correct.[3]

As the Claims Court (Pet. App. 22a) and Federal Circuit (*id.* at 7a) both readily acknowledged, contracts *can be* written in such a way that they incorporate agency regulations and make them binding on the government as a matter of contract. The question here is whether the contract between petitioners and FmHA *was* written so as to have that effect. Both courts below correctly held that it was not. The contract says nothing about incorporation of agency regulations as contractual obligations; all it says is that "[t]his agreement is subject to the present regulations of [FmHA] and to its future provisions not inconsistent with the express provisions hereof." The purpose of such a

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(Davis, J.), and *Commerce Int'l Co.* v. *United States*, 338 F.2d 81, 85 (Ct. Cl. 1964) (Davis, J.).

[3] It is, any event, unclear what duty imposed by regulation FmHA could possibly be said to have violated.

clause is to put contracting parties on notice that the terms contained in the contract are necessarily subordinate to legal obligations imposed by present and future regulations,[4] not to make the agency answerable in damages for each and every breach of one of its regulations (see *id.* at 26a).

There is no conflict between the Federal Circuit's decision and the decision in *Bodek* v. *Department of Treasury, Bureau of Public Debt,* 532 F.2d 277 (2d Cir.), cert. denied, 429 U.S. 849 (1976). In *Bodek,* the plaintiff sought to force the Treasury Department to issue him duplicate savings bonds when his parents refused to relinquish custody of bonds issued to him for his thirteenth birthday (532 F.2d at 278, 280). The issue was not, as here, whether a plaintiff could collect breach-of-contract damages for violation of a regulation allegedly incorporated into an agreement. Rather, the issue was whether, without regard to any contract, a statutory provision and implementing regulations for replacement of lost or stolen bonds (31 U.S.C. (1976 ed.) 738a; 31 C.F.R. 315.25) provided for replacement in such circumstances (532 F.2d at 280). In resolving the statutory issue, the court determined only that the son was not entitled to replacement because his claim did "not fall within the category of 'loss * * * ' covered under the * * * replacement provision" (*ibid.*). Thus, the court's footnote reference to Treasury regulations as "an implied part of the contract between the United States and a purchaser of its bonds" (*id.* at 279 n.7) was dictum and in any event referred to a kind of "contract"—the one arguably implied by law to exist between the government and every purchaser of its securities—different from the one at issue here.

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[4] Cf. *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 384-386 (1947) (participants in government programs must abide by statutes and regulations even if not made an express part of their contract).

Nor is the decision below inconsistent with *Neal* v. *Bergland,* 646 F.2d 1178 (6th Cir. 1981), aff'd on other grounds *sub nom. Block* v. *Neal,* 460 U.S. 289 (1983). The court in that case *rejected* the plaintiff's "contract" claim on the ground that FmHA had no duty to provide technical assistance or to inspect and supervise construction when it made a rural housing loan to the plaintiff (646 F.2d at 1181). The court's observation (*ibid.*) that neither statute nor regulation imposed any such duty on the agency can hardly be taken to mean that, if such duties had existed, they would automatically have been enforceable in an action for damages for breach of contract.[5]

Petitioners can point to no decision of a court of appeals other than the court below in which, in the absence of a contract clause that incorporates agency regulations much more specifically than does petitioners' clause E, an agency has been held liable in damages for breaching regulations that concededly (see note 5, *supra*) do not by themselves support an action for damages. In the absence of such a conflict, review by this Court is not warranted.[6]

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[5] Indeed, a fair reading of the brief passage in *Neal* rejecting the "contract claim" suggests that the court was using that phrase as shorthand for all claims cognizable under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, and not just for claims that, strictly speaking, arise under a contract. See 646 F.2d at 1181 & n.4. In the present case, it is undisputed that petitioners have no valid Tucker Act claim for damages directly under the governing statute or regulations but must instead depend on their theory that those regulations were incorporated wholesale into the contract (Pet. App. 6a n.1, 21a). *Neal* does not support that theory.

[6] Since petitioners cannot point to any express contractual commitments by FmHA, they seek to create a "wholly new ground of obligation" by mere implication. But, as this Court has observed, liability cannot be imposed on the government "without clear words." *Pine Hill Co.* v. *United States,* 259 U.S. 191, 196 (1922). The Federal Circuit applied that principle here by refusing to infer governmental

3. Finally, petitioners contend (Pet. 25-30) that there were genuine disputes of material fact with respect to FmHA's good faith. All of the factual allegations that petitioners discuss, however, were explicitly assumed by the Claims Court to be true (Pet. App. 15a-16a), with two trivial exceptions.[7] Moreover, in observing that the time taken to approve the loan did not constitute undue delay (*id.* at 9a), the court of appeals merely relied on a fact that petitioners never disputed—that it took less than 90 days for approval of their 1984 loan application. There were no genuinely disputed issues of material fact that precluded the court from affirming the dismissal of petitioners' complaint.

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guarantees to petitioners that were not expressly stated (Pet. App. 7a). See *Somalia Development Bank* v. *United States,* 508 F.2d 817, 822 (Ct. Cl. 1974); *Eastport Steamship Corp.* v. *United States,* 372 F.2d 1002, 1010 (Ct. Cl. 1967) (Davis, J.); *Farm Security Administration* v. *Herren,* 165 F.2d 554, 562 (8th Cir.), cert. denied, 333 U.S. 875 (1948).

[7] Petitioners contend (or at least imply) that the county supervisor did not meet with the county committee on March 1, 1984 (Pet. 26), and that the county supervisor on or about that date told them to take their complaints to their Congressman (Pet. 26-27). Given the undisputed facts that the county committee's favorable certificate of petitioners' loan eligibility and a correct Farm and Home Plan were forwarded to the state office just one week later (on March 8, 1984) and led to the approval of a $265,000 loan within 30 days after that (on April 6, 1984), petitioners' assertions could not possibly "affect the outcome of the suit under the governing law." *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The delay of which petitioners complain in this case was that allegedly caused by the submission of an inaccurate Farm and Home Plan in early February 1984, and petitioners have come forward with nothing (other than bare allegations unsupported by record evidence) to suggest that anything more than an honest mistake could have caused that delay.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
DAVID M. COHEN
ROBERT S. GREENSPAN
ROBERT D. KAMENSHINE
TERRENCE S. HARTMAN
Attorneys

NOVEMBER 1988

U.S. GOVERNMENT PRINTING OFFICE 1988—241-699/60781